No. 16591 Vol 3115

United States
Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a Corporation, Appellant,

vs.

HARRY J. McQUEEN, Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—11-3-59

No. 16591

United States
Court of Appeals
for the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a Corporation, Appellant,

vs.

HARRY J. McQUEEN, Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

DUNNE, DUNNE & PHELPS,
JOHN MARTIN,

333 Montgomery Street,
San Francisco 4, California,

Attorneys for Appellant.

HEPPERLE & HEPPERLE,
HERBERT O. HEPPERLE,
ROBERT R. HEPPERLE,

1906 Hobart Building,
San Francisco 4, California,

Attorneys for Appellee.

In the United States District Court, Northern District of California, Southern Division

No. 36772-Civil

HARRY J. McQUEEN, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant.

EXCERPT FROM DOCKET ENTRIES

1957

Sept. 25—Filed complaint — issued summons (demand for jury trial).

* * * * *

Dec. 4—Filed answer of defendant.

18—Filed notice by plaintiff of taking deposition of Custodian of Records, Southern Pacific Hospital & issued subp.

1958

Jan. 8—Filed deposition of Henrietta Roher.

Oct. 15—Filed notice by plaintiff of motion to set, Oct. 20, 1958, with certificate of readiness.

20—Ordered case to bottom settlement calendar. (Murphy)

1959

Jan. 6—Filed notice by defendant of taking deposition of plaintiff.

1959

Jan. 6—Filed notice by defendant of taking deposition of Custodian of Records, S. P. General Hospital & issued subp.

9—Filed notice by defendant of taking deposition of Custodian of Records, Illinois Central Hospital, Chicago.

* * * * *

Jan. 27—Filed deposition of Geraldine Van Orman, Custodian of Records, SP General.

Feb. 3—Filed deposition of Helen Gulis (Custodian of Records Ill. Central Hospital).

4—Ordered case for settlement conference Feb. 6, 1959 at 10 AM. (Harris)

6—Settlement conference. Further conference continued to Feb. 20, 1959. (Harris)

20—Ordered case for trial May 4, 1959, on stipulation. (Harris)

Mar. 19—Filed deposition of Harry J. McQueen.

Apr. 23—Ordered on stipulation of counsel, case off trial calendar and further settlement conference continued to May 13, 1959. (Wollenberg)

May 13—Further settlement conference. Case set for trial June 1, 1959. (Wollenberg)

* * * * *

June 1—Ordered case assigned to Judge Goodman for trial this date. (Wollenberg)

1—Jury trial. Jury impaneled, evidence and exhibits introduced and further trial continued to June 2, 1959. (Goodman)

1959

June 2—Further jury trial. Evidence and exhibits introduced and further trial continued to June 3, 1959. (Goodman)

3—Further jury trial. Evidence and exhibits introduced, arguments heard, jury retired and returned verdict for plaintiff vs. defendant in sum $60,000.00. Execution stayed for 10 days after determination of motion for new trial. (Goodman)

3—Filed verdict.

3—Filed proposed instructions to jury, by plaintiff.

3—Filed proposed instructions to jury, by defendant.

4—Entered judgment—filed June 4, 1959—for plaintiff vs. Southern Pacific Company in sum $60,000.00 & costs. (Clerk)

* * * * *

10—Filed memo. of costs by plaintiff ($191.84).

11—Costs taxed $191.84. (Clerk)

11—Filed notice by defendant of motion for new trial, June 19, 1959 before Judge Goodman.

18—Ordered after hearing, motion for new trial denied. (Goodman)

26—Filed stipulation staying execution and further pleading by defendant to July 18, 1959.

1959

July 16—Filed notice of appeal by defendant.

16—Filed appellant's designation of record on appeal.

17—Mailed notices.

17—Filed supersedeas bond and order staying execution in sum of $70,000.00, "Approved and execution stayed until further order of Court, George B. Harris, United States District Judge."

Aug. 17—Filed reporter's transcript of settlement of instructions, June 2, 1959.

[Title of District Court and Cause.]

COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL

Plaintiff complains and alleges that:

I.

At all times herein mentioned defendant Southern Pacific Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and that said defendant, at all times herein mentioned, was, and now is engaged in the business of a common carrier by railroad in interstate commerce in the City of Oakland, County of Alameda, State of California.

II.

At all times herein mentioned, defendant was a common carrier by railroad, engaged in interstate

commerce, and plaintiff was employed by defendant in such interstate commerce, and the injuries sustained by him, hereinafter complained of, arose in the course of and while plaintiff and defendant were engaged in the conduct of such interstate commerce.

III.

This action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. Section 51 et seq.

IV.

On or about May 29, 1957, at or about the hour of 3:50 p.m., plaintiff was regularly employed by defendant as a brakeman of freight train #X6461W traveling into defendant's West Oakland Yard in the County of Alameda, State of California.

V.

At said time and place it was the duty of plaintiff to be, and he was, riding in the caboose of said freight train.

While plaintiff was in such position, defendant, through its agents, servants and employees other than plaintiff, so carelessly and negligently operated and controlled said freight train as to cause a sudden, unusual and violent slack action between the cars of said train, and as a direct and proximate result of such carelessness and negligence,

plaintiff was violently thrown from his position, and plaintiff thereby sustained the personal injuries hereinafter enumerated.

VI.

Plaintiff so sustained severe physical injuries and endured extreme physical pain and grievous mental anguish. Said physical injuries, so far as are now known, are particularly, although not exclusively, as follows, to-wit: strain and sprain of the cervical spine; recoil injury, cervical spine, with reflex effect into head and shoulder; contusions of the skull and of the brain; injuries to the left arm and left hand; breaking of the teeth; injuries to the ears; loss of equilibrium; and severe shock and injury to his nervous system.

VII.

Prior to said injuries plaintiff was a well and able-bodied man of the age of 63 years, and was earning and receiving from his employment with the defendant a regular salary of approximately $700 per month. As plaintiff is informed and believes and therefore alleges, by reason of said injuries, plaintiff's earning capacity is now, and in the future will be, impaired, all to the damage of plaintiff in the sum of $200,000.00.

Wherefore, plantiff prays judgment against defendant in the sum of Two Hundred Thousand

($200,000.00), and for his costs of suit herein incurred.

HEPPERLE & HEPPERLE,
/s/ HERBERT O. HEPPERLE,
/s/ ROBERT R. HEPPERLE,
Attorneys for Plaintiff.

Trial by jury of all of the issues in the above entitled action is hereby demanded.

HEPPERLE & HEPPERLE,
/s/ HERBERT O. HEPPERLE,
/s/ ROBERT R. HEPPERLE,
Attorneys for Plaintiff.

[Endorsed]: Filed September 25, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now, Southern Pacific Company, a corporation, the defendant above named, and answering the complaint of plaintiff on file herein shows as follows:

I.

Admits as follows:

1. At all times mentioned in the complaint, and herein, defendant was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware and was, and now

is, as a part of its business, engaged in the business of a common carrier by railroad in interstate and intrastate commerce in the City of Oakland, County of Alameda, State of California, and in other parts of the State of California and in other states.

2. On May 29, 1957, at approximately 3:50 p.m., plaintiff was employed by defendant as a brakeman and was a member of the crew of freight train X6461W which was proceeding west at or near the West Oakland Yard in Alameda County, California. At said time and place plaintiff was riding in the caboose of said train. At said time and place an emergency stop was made and said stop caused slack action in said train.

II.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of the complaint in respect of plaintiff's conduct, except as hereinabove expressly admitted, or the nature or extent of his injuries, or his age. Defendant denies each and every allegation of paragraphs I, II, III, IV, V, VI and VII of the complaint not hereinabove expressly admitted or denied. Defendant denies each and every allegation of the complaint not hereinabove admitted or denied.

And for a Second, Separate and Independent Answer and Defense to the complaint, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in part I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length. If plaintiff was injuried at said time and place on said occasion, defendant is informed and believes and upon such ground alleges the plaintiff was negligent in the premises and in those matters set forth in the complaint and negligently conducted himself in and about said caboose and negligently performed his duties as a brakeman. Said conduct of plaintiff, as aforesaid, proximately caused and contributed to the accident, injuries and damages, if any, alleged by plaintiff.

Wherefore, defendant Southern Pacific Company, a corporation, prays that plaintiff take nothing by his complaint on file herein; that defendant have judgment for its costs of suit incurred herein; and for such other, further and different relief as, the premises considered, is proper.

/s/ A. B. DUNNE,
DUNNE, DUNNE & PHELPS,
/s/ DESMOND G. KELLY,
Attorneys for Defendant
Southern Pacific Company.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 4, 1957.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Sixty Thousand Dollars ($60,000).

/s/ WILLIAM A. DREYER,
Foreman.

Filed June 3, 1959, at 2 o'clock and 50 minutes p.m.

C. W. CALBREATH,
Clerk,
/s/ By EDWARD C. EVENSEN,
Deputy Clerk.

[Endorsed]: Filed June 3, 1959.

[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY DEFENDANT

The defendant, for whom the undersigned attorneys appear, requests the Court to give the within instructions, and hereby moves that the same be given on submission of the above entitled cause to the jury herein.

Dated June 1, 1959.

/s/ JOHN W. MARTIN,
/s/ A. B. DUNNE,
DUNNE, DUNNE & PHELPS,
Attorneys for Defendant.

* * * * *

Defense Instruction No. 6

Contributory negligence in this case is such an act or omission on the part of the plaintiff amounting to want of ordinary care in the circumstances as, cooperating or concurring with a negligent act of the defendant, was a proximate cause of any injury complained of.

Contributory negligence defined.

Defense Instruction No. 7

If the plaintiff, Harry J. McQueen, was guilty of contributory negligence, the damages shall be diminished by you in proportion to the amount of negligence attributable to him. The fact that I instruct you that under the Federal Employers' Liability Act contributory negligence is not a complete defense does not mean that such negligence, where it was present, is to be disregarded. To the contrary, under the rule I have just stated, if there was contributory negligence, it is to be given proper effect by you toward reducing the award.

45 USCA §53; Illinois C. R. Co. v. Skaggs, 240 US 66, 60 L ed. 528; Kansas etc. Co. v. Jones, 241 US 181, 60 L ed. 943.

Damages—contributory negligence.

Defense Instruction No. 8

If plaintiff was guilty of contributory negligence and such contributory negligence is to be given effect under the instructions of the Court, the damages shall be diminished by you in proportion to

the amount of negligence attributable to plaintiff. In such case, the fact that I instructed you that under the Federal Employers' Liability Act contributory negligence is not a complete defense does not mean that such negligence, where it is present, is to be disregarded. To the contrary, under the rule, if there was contributory negligence, it is to be given proper effect by you toward reducing the award in this way. You should evaluate the detriment which resulted to plaintiff without regard to any negligence on his part; you will then consider the negligence, if any, on his part which proximately caused and contributed to his injury and detriment, will compare it with the negligence of the defendant, and will then reduce the damages which you award to the plaintiff in proportion to the amount of negligence, attributable to the plaintiff to the end that the plaintiff himself shall bear the share of his injury and detriment which you find properly attributable to his own conduct.

45 USCA §53; Illinois C. R. Co. v. Skaggs, 240 US 66, 60 L ed. 528; Kansas etc. Co. v. Jones, 241 US 181, 60 L ed. 943.

Defense Instruction No. 9

It is not the design or effect of the statute that contributory negligence is to be given no effect or is to be eliminated from consideration. To the contrary, the design and effect of this statute is "to place the responsibility for negligence in all cases just where it belongs, and to make everybody who is responsible for negligence which produces injury

or an accident responsible for that part of it and to the extent to which they contributed to it." Where recovery is permitted for injury to an employee and he was guilty of contributory negligence, the damages are to be reduced in proportion as the employee's own negligence proximately contributed to bring about his injury and to that extent the defendant is exonerated. If both parties were guilty of negligence which was a proximate cause of the accident, the defendant railroad is responsible only "to the extent to which it was to blame" and the plaintiff is charged with responsibility to the extent to which the employee was to blame and any award, if any is made, can be for only such amount as results after deducting a proportional part of the damages corresponding to the amount of negligence attributable to the employee.

45 USCA § 53; Norfolk & W. R. Co. v. Earnest, 229 US 114, 122, 57 L ed., 1096, 1101; Ill. C. R. Co. v. Skaggs, 240 US 66, 73, 60 L ed. 528, 532.

Defense Instruction No. 10

Contributory negligence is an affirmative defense, and the burden of proof of it rests on the party who alleges it. But in considering this rule, you will bear in mind that, in determining the question of contributory negligence, you must consider the evidence which has been introduced on the plaintiff's case, as well as the evidence introduced by defendant. If the evidence introduced on the plaintiff's case itself shows contributory negligence, a defendant may rely on that evidence without intro-

ducing any evidence. So, also, if the evidence introduced on the plaintiff's case, in conjunction with the evidence introduced by the defense, shows contributory negligence, you must find in accordance with all of the evidence, even though the evidence for the defense, if it stood alone, might not show contributory negligence. In considering the issue of contributory negligence, it is your duty to consider all of the evidence which has been introduced.

Miller v. U. P. R. Co., 290 US 227, 232, 78 L ed. 285, 289; Mautino v. Sutter Hospital Ass'n., 211 Cal. 556, 562; Hoy v. Tornich, 199 Cal. 545, 551; Curtis v. Kastner, 220 Cal. 185, 192; Cook Paint & Varnish Co. v. Hickling, 76 F 2d 718, 721 (Circ. 8).

Contributory negligence—Burden of proof on defendant—But evidence given on plaintiff's case is not to be disregarded.

Defense Instruction No. 11

The plaintiff was under a continuing duty to exercise reasonable care for his own safety at all times. There is nothing in any of the circumstances of this case which suspended that duty, relieved him from performing it or excused a violation of it, if any. The defendant owed him no higher duty to look out for the safety of the plaintiff than he owed to look out for his own safety for the degree of care owed by both plaintiff and defendant was the same. If plaintiff failed to perform this duty he was guilty of negligence.

Rivera v. Goodenough, 71 CA 2d 223, 233.

Defense Instruction No. 12

If the plaintiff was experienced in what he was doing and was in full possession of his faculties, then, in determining what, if any, fault there was on his part, you are entitled to find, if there is no proof to the contrary that he knew and appreciated the necessary, normal and obvious dangers, hazards, and risks incident to what he was doing and the defendant railroad, in the absence of notice to the contrary, was entitled to make and act upon that assumption.

Toledo etc. Co. v. Allen, 276 US 165, 169, 170, 72 L ed. 513, 516; Mo. Pac. R. Co. v. Aeby, 275 US 426, 430, 72 L ed. 351, 354.

* * * * *

[Endorsed]: Filed June 3, 1959.

United States District Court for the Northern District of California, Southern Division

No. 36772-Civil

HARRY J. McQUEEN, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on June 1, 1959 before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues

joined herein: Robert Hepperle, Esq., appearing as attorney for the plaintiff, and John Martin, Esq., appearing as attorney for the defendant, and the trial having been proceeded with on June 1, 2 and 3, in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury, and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Sixty Thousand ($60,000.00) Dollars. William A. Dreyer, Foreman", and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Sixty Thousand and No/100 ($60,000.00) Dollars, together with his costs herein expended taxed at $191.84.

Dated: June 4, 1959.

C. W. CALBREATH,
Clerk,
/s/ By MARGARET P. BLAIR,
Deputy Clerk.

Entered in Civil Docket June 4, 1959.

[Endorsed]: Filed June 4, 1959.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To the Plaintiff Above Named and to His Attorney:

You are hereby notified that on Friday, the 19th day of June, 1959, at the hour of 10:00 a.m. on said day, or as soon thereafter as counsel can be heard, or at such time as the Court may fix, if it does fix another time, the defendant Southern Pacific Company, a corporation, by its attorneys, will move the above entitled Court, the Division thereof presided over by Honorable Louis E. Goodman, a Judge of said Court, at the courtroom of said Court and Division, Room 258, United States Post Office Building, Seventh and Mission Streets, San Francisco, California as follows:

I.

1. For an order agreeably to Rule 59 of the Federal Rules of Civil Procedure vacating and setting aside the verdict and judgment herein and granting the defendant Southern Pacific Company a new trial. Attached hereto, marked Exhibit "A" and herein incorporated is a draft of the order which defendant proposes.

2. Said motion will be made upon this notice of motion and upon all of the records, papers and files herein, including a transcript of the testimony and proceedings had upon the trial.

3. Said motion will be made upon the following grounds and each of them severally:

(a) The evidence is insufficient to sustain the verdict.

(b) The verdict is excessive.

(c) The verdict is against the weight of the evidence and is not sustained by the evidence in that the verdict is excessive and in that it is excessive the verdict is contrary to the evidence and to the weight thereof.

(d) The verdict is excessive and appears to have been given and was given under the influence of passion and/or prejudice.

(e) Errors of law occurring during the trial.

DUNNE, DUNNE & PHELPS,
/s/ JOHN W. MARTIN,
Attorneys for Defendant.

[Title of District Court and Cause.]

EXHIBIT "A"

ORDER

Southern Pacific Company, a corporation, having duly moved the above entitled Court to vacate and set aside the verdict and judgment herein and to grant to said defendant Southern Pacific Company, a corporation, a new trial, and the matter having been heard and submitted to the Court, and all the parties having appeared upon the making and hearing of said motion, and the Court having considered the same and being advised in the premises, it is

Exhibit "A"—(Continued)

Ordered, Adjudged and Decreed that the verdict and judgment herein be, and they are hereby, vacated and set aside and a new trial of this action is hereby granted to defendant Southern Pacific Company, a corporation.

Done in open court this .... day of ....., 1959.

.....
United States District Judge.

Proof of Service by Mail Attached.

[Endorsed]: Filed June 11, 1959.

United States District Court for the Northern District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 18th day of June, in the year of our Lord one thousand nine hundred and fifty-nine.

Present: the Honorable Louis E. Goodman, Chief Judge.

[Title of Cause.]

This case came on regularly this date for hearing on motion for new trial by defendant.

Ordered, motion for new trial denied.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto and their respective attorneys that plaintiff will not cause execution to issue upon the judgment in the above entitled action until on or after July 18, 1959, and the defendant may have such time within which to file a stay bond or take such other steps as it may be advised.

Dated: June 26, 1959.

/s/ HERBERT O. HEPPERLE,
/s/ ROBERT R. HEPPERLE,
HEPPERLE & HEPPERLE,
Attorneys for Plaintiff.

/s/ JOHN W. MARTIN,
/s/ C. B. DUNNE,
DUNNE, DUNNE & PHELPS,
Attorneys for Defendant.

[Endorsed]: Filed June 26, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Southern Pacific Company, a corporation, the defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final

judgment in the above entitled action in favor of plaintiff and against defendant and from the whole thereof being the judgment entered in this action on June 4, 1959.

DUNNE, DUNNE & PHELPS,
/s/ ARTHUR B. DUNNE,
/s/ JOHN W. MARTIN,
Attorneys for Appellant Southern Pacific Company, a Corporation.

[Endorsed]: Filed July 16, 1959.

[Title of District Court and Cause.]

SUPERSEDEAS BOND AGREEABLE TO RULE 73 (d) FEDERAL RULES OF CIVIL PROCEDURE AND ORDER THEREON

Whereas, Southern Pacific Company, a corporation, defendant in the above entitled action is about to, or intends to, appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action in the above named court on June 4, 1959, in favor of Harry J. McQueen, plaintiff, and against Southern Pacific Company, a corporation, defendant, for the sum of Sixty Thousand Dollars ($60,000.00) and costs and from the whole of said judgment; and

Whereas, said Southern Pacific Company, a corporation, as appellant is desirous to staying execution of said judgment so to be appealed from and giving a bond for costs on appeal;

Now, Therefore, Indemnity Insurance Company of North America, incorporated under the laws of the State of Pennsylvania, for the purpose of making and guaranteeing and becoming surety on bonds and having complied with the requirements of the State of California in that behalf, does hereby, in consideration of the premises, undertake and promise, and acknowledge itself bound, in the sum of Seventy Thousand Dollars ($70,000.00) being in excess of the whole amount of the judgment, costs on appeal, interest and damages for delay, that if said judgment appealed from, or any part thereof, be affirmed, or if for any reason the said appeal is dismissed the said judgment will be satisfied in full or will be satisfied as to the part which is affirmed, if affirmed only in part, together with costs, interest and damage for delay which may be awarded and that if payment is not made accordingly within thirty (30) days after the filing of the remittitur from the United States Court of Appeals for the Ninth Circuit or from such other court as may and shall lawfully issue the remittitur in the court from which the said appeal is taken viz. in the United States District Court for the Northern District of California, Southern Division, judgment may be entered in said action on motion of plaintiff and appellee, Harry J. McQueen, and without notice to said Indemnity Insurance Company of North America, a corporation, in his favor against the undersigned surety for said amount, together with interest and costs and any damages which may be awarded against said appellant upon

said appeal and irrevocably appoints the Clerk of said Court as its agent upon whom any papers affecting its liability upon said bond may be served.

In Witness Whereof, the said Indemnity Insurance Company of North America has caused this obligation to be executed by its duly authorized attorney in fact and its corporate seal to be affixed at San Francisco, California, this 16th day of July, 1959.

[Seal] INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,
/s/ By RODGER E. HAGEMAN,
Its Attorney in Fact.

(Executed in five (5) counterparts.)

Approved and execution stayed until the further order of court.

/s/ GEO. B. HARRIS,
United States District Judge.

July 17, 1959.

Power of Attorney and Notary's Certificate Attached.

[Endorsed]: Filed July 17, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of Cali-

fornia, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by attorneys for the appellant.

Excerpt from Docket Entries.

Complaint.

Answer.

Verdict.

Plaintiff's Proposed Instructions to Jury.

Defendant's Proposed Instructions to Jury.

Judgment on Verdict.

Notice by Defendant of Motion for New Trial.

Minute Order Denying Motion for New Trial.

Stipulation for Stay of Execution.

Notice of Appeal.

Supersedeas Bond.

Appellant's Designation of Record on Appeal.

Deposition of Harry J. McQueen.

Deposition of Henrietta Roher (Custodian of Records SP Hospital).

Deposition of Geraldine Van Orman (Custodian of Records SP Hospital).

Deposition of Helen Gulis (Custodian of Records Illinois Central Hospital).

Reporter's Transcript of Trial Proceedings, June 1, 1959.

Reporter's Transcript of Trial Proceedings, June 2, 1959.

Reporter's Transcript of Settlement of Instructions, June 2, 1959.

Reporter's Transcript of Trial Proceedings, June 3, 1959.

Reporter's Transcript of Closing Argument and Instructions, June 3, 1959.

Plaintiff's Exhibits 1, 2, 3, 4 and 5.

Defendant's Exhibits A, B and C.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 25th day of August, 1959.

[Seal] C. W. CALBREATH,
Clerk,
/s/ By MARGARET P. BLAIR,
Deputy.

The United States District Court, Northern District of California, Southern Division

No. 36,772

HARRY J. McQUEEN, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

June 1, 1959

Before: Hon. Louis E. Goodman, Judge.

Appearances: For the Plaintiff: Messrs. Hepperle & Hepperle, by Robert R. Hepperle, Esq. For the

Defendant: Messrs. Dunne, Dunne & Phelps, by John Martin, Esq. [1]*

The Clerk: Harry J. McQueen versus Southern Pacific Company, for trial.

Mr. Hepperle: Ready, your Honor.

Mr. Martin: Ready for the defendant, your Honor.

(Thereupon a jury was impaneled and sworn and the case was continued to the hour of 2:00 o'clock p.m.)

Mr. Hepperle: May it please the Court and ladies and gentlemen of the jury:

It is now my duty to make what is called an opening statement in this case. What I have to say is neither evidence nor argument, but it is an outline or preview of the case so that you will be in a better position to follow the evidence as it comes in in the testimony of the witnesses and the various exhibits which his Honor may admit into evidence.

As his Honor indicated this case is the case of McQueen against the Southern Pacific Company. It arises under the Federal Employers Liability Act, which his Honor will tell you about further in his instructions, and it is a case under this Federal law for damages or injuries sustained by Mr. McQueen while he was employed as a brakeman by Southern Pacific Company.

We have sued for damages in the sum of $200,000 here.

---

* Page numbers appearing at top of page of Reporter's Transcript of Record.

Mr. McQueen is now of the age of 65 years old. He was 63 when he was injured. He was born May 11, 1894. He has spent [3] all of his adult life as a railroad man, except for a few odd jobs here and there between working for various railroads. He has been employed by Southern Pacific Company since 1943. He worked regularly for them. He has been promoted to the position of conductor and has acted as the conductor of a train when his seniority permitted.

The railroad men work under a seniority system and the man with the greatest seniority has the pick of the jobs.

On the day of this accident, May 29, 1957, Mr. McQueen was working as a brakeman. They had a freight train that was traveling from Roseville to West Oakland. Mr. McQueen's position in the crew was that of rear brakeman; that is, he was the brakeman who worked in the vicinity of the caboose, and he was riding in the caboose at the time of the accident.

The freight train that they had that day was 92 cars long, or consisted of 92 cars. It would be about one mile long in length.

The evidence will show that freight cars are constructed differently from passenger cars in respect of their couplers. In respect of a coupler of a freight car, there is something called "slack" in the coupler, six inches to each end of the car, or one foot of slack for each car in the train. So that this train, consisting of 92 cars, if it were compressed together from the caboose on one end to the engine

on the head end would be 92 feet shorter than if it were stretched [4] as it would be by the engine pulling it on level ground.

Now, most of the freight cars in this train were loaded. It comprised a certain number of tons. There were three diesel locomotive units at the head end of the train, which in themselves weighed some 840,000 pounds.

In the cab of the locomotive, in addition to the engineer and fireman, rode another member of the crew called the head brakeman. So those three men were in the cab of the locomotive. The conductor and Mr. McQueen were in the caboose at the rear end of the train.

As they approached West Oakland, they had entered the yard actually, the speed of the train was somewhere between 6 and 8 miles an hour. Their train was stretched. That is, the action of the three-unit diesel locomotive pulling the train had stretched out those 92 feet of slack in the train.

They had been stopped for a period for a signal, and in the yard at Oakland, the signals are controlled by a man in a tower who flips a little switch and by electrical means the switches are thrown and the signals are changed so as to maneuver trains in and out of the yard.

While they were stopped, immediately before the accident, Mr. McQueen looked out and saw that the stop signal had been changed to a green signal or a "proceed" signal so that the signals were clear for them to enter the rest of the yard to arrive at their final destination. [5]

Mr. McQueen, as a part of his duties, took down the markers from the rear of the caboose—those are the ones that show red to the rear and green to the side to indicate the rear of the train. He had gone into the caboose and had just sat down at the conductor's desk to write a note for the caboose supply man to put some more supplies on the caboose while it was there at West Oakland, and he had only been sitting there in the chair at the conductor's desk for a matter of 30 seconds to a minute or so when, it is stipulated by counsel, a student towerman in the tower negligently flipped a switch which threw the red light or changed the green signal to red immediately in front of the train. And the evidence will show that when that signal was changed to red the engineer had to make what is called an emergency stop by applying the brakes at full application, so that there was a sudden, violent stop of the train, which was particularly violent in the caboose at the rear of the train.

The evidence will show that this sudden, violent stop was caused by the "dynamiting" of the train, as they call it when they apply the air in full emergency; that this sudden, violent stop came with no warning, with no excuse, and that it was completely unexpected by the men in the caboose.

The evidence will show that when a stop like that is made with a train such as is involved in this accident, that the engines at the front of the train, the brakes are applied there first, and then in the cars, going toward the rear of the [6] train, so that the front end of the train makes a complete stop while

the rear end of the train is running in this 92 feet of slack.

So that the evidence will show that when the caboose came to a stop the rest of the train was already stopped, and weighing many, many tons the caboose ran into the balance of the train and it was like running into a stone wall.

The evidence will show that this kind of a stop is called "rough handling" by the railroad men, and it is on that and the negligent changing of this signal from green to red, causing this stop, that we base our action here.

The evidence will show that when this stop was made Mr. McQueen was thrown from his chair, draped over the coal box next to the conductor's desk; that he struck against the grab iron in the process of being thrown; that he hit his head and broke his upper plate, his teeth.

He hit the side of his head, he skinned his ear, he bumped and injured his arm, and he didn't know it at the time, but it was discovered later that he had ruptured an intervertebral disc in his neck so that the ruptured intervertebral disc protruded and pressed upon the spinal cord in the region of his neck there.

The evidence will show that the conductor was also thrown in this accident, but at the time that it happened he had left his conductor's chair while Mr. McQueen sat down in it and [7] the conductor had gone over and sat down on a locker, so that he was thrown to the side. He was facing kind of sideways as far as the direction of movement was con-

cerned, and although he was shaken up, he was thrown sideways so that he himself did not receive any real injury.

After this stop was made, the signal was changed, the engineer pumped up the train line so that the brakes would be released. The train then moved on down another one or two miles to its final destination there in the Oakland yard.

Mr. McQueen and his conductor got off the caboose and went to the trainmaster's office—that is, the conductor went to the trainmaster's office, and right next to it is the Southern Pacific emergency hospital over there at West Oakland. Mr. McQueen went to the hospital, but there was no doctor available there at the time so he came back to the trainmaster's office where the conductor had reported the accident to the trainmaster and had requested medical assistance or attention for Mr. McQueen. The evidence will show that since there was no doctor available there, that the trainmaster telephoned one of the Southern Pacific doctors and by telephone an arrangement was made to prescribe some pain pills to be made available at a drug store.

The trainmaster then in his automobile drove Mr. McQueen to the drug store to get the pills and then drove him to his hotel there in West Oakland. [8]

The evidence will show that Mr. McQueen's condition was getting worse and worse. He took the pills, but he was so rapidly getting worse that he phoned up the yard office and laid off because of his injury, and after getting to his hotel his condition became still worse and he was taken by ambu-

lance to the Southern Pacific Hospital here in San Francisco.

Here X-rays were taken, but there were no beds available in the hospital at that time and Mr. McQueen was sent by taxi to the Ferry Building. By the time he got there, this was about 2 o'clock in the morning so there were no more ferries running. He stayed in a hotel in San Francisco that night, and the next day his condition was such that he had to telephone over to a friend at his hotel to come over here and drive him back to Oakland. Since that time he has been in and out of the Southern Pacific General Hospital as an out-patient on many occasions, and he has also been a bed patient confined to the hospital for some period of time.

There were many tests and X-rays, examinations made. The only treatment that he got at the Southern Pacific Hospital was something in the way of physiotherapy.

Finally, on March 18, 1958, he was discharged from the Southern Pacific General Hospital without what they call a "return to duty" slip. In other words, the doctors discharged him from the hospital but did not give their permission for him to return to work or attempt to return to work. [9]

The evidence will show that at the time of Mr. McQueen's discharge, that under the heading of "final diagnosis," was first entered, "probable posterior column disease, spinal cord, etiology unknown"; and that there was also entered "CNS lues," which means "Central Nervous System lues,"

and the word "lues" is a synonym for the word syphilis."

The evidence will show that both of these diagnoses were wrong or were in error; that first as to the lues or syphilis, there was no history of it. There was an equivocal blood test on one occasion, but the evidence will show that that in itself is not enough for such a diagnosis and that the tests on both the blood and the spinal fluid made before and after were negative; and that, further, the neurological examination was completely negative in that regard and did not substantiate any such diagnosis.

The evidence will also show that the diagnosis of spinal cord disease or degenerative spinal cord disease was also in error.

After Mr. McQueen was discharged from the Southern Pacific Hospital he was seen by a specialist, a neurosurgeon, or sometimes they are called neurological surgeons, a Dr. Nathan Norcross in Oakland. Dr. Norcross had previously examined Mr. McQueen on December 30, 1957, at which time he found that Mr. McQueen had, among other things, a cervical neuralgia, and that he had fasciculations or twitchings in the muscles [10] of the calves of his legs, which the doctor was not able to completely diagnose at that time, but following Mr. McQueen's discharge from the Southern Pacific General Hospital, Dr. Norcross examined him again and had him admitted to Peralta Hospital where, on March 10, 1959, a myelogram was performed.

The evidence will show that the way in which that is done is a needle is inserted into the spinal canal

in the region of the low back and some spinal fluid is withdrawn, and that a radio-opaque material is substituted, and then by means of a fluoroscope and X-rays with the patient tilted back and forth on a table like a carpenter's level, why, this radio-opaque material is maneuvered up to the region of the neck here and X-rays are taken to preserve the appearance seen by the doctor on the fluoroscope, and this myelogram of March 10th indicated that Mr. McQueen had a large ruptured disc in his neck.

Thereafter, Mr. McQueen was operated on By Dr. Norcross at Peralta Hospital where, upon operation, it was demonstrated and seen that this ruptured disc was pressing upon the spinal cord.

The evidence will show that this operation in itself is a major one and a serious one, and that the effect of the operation alone to expose the structure of the neck so as to be able to correct this ruptured disc situation is such as, by itself, to cause the equivalent of a very severe whiplash injury of the neck. [11]

The pressure on the spinal cord was relieved. But the evidence will show that the cells or tissue of the spinal cord do not regenerate. The effect of the operation was simply to stop further pressure upon the spinal cord.

I should say that from the time of the accident up to the operation Mr. McQueen had a great deal of pain and discomfort. In the early period even his vision was disturbed so that looking down at the sidewalk, there was a concave appearance. He had trouble with his balance, and he walked about like

a manikin or a zombie, with his feet wide apart in an attempt to maintain his balance as he would walk. The evidence will show that the reason for that condition was because of the pressure of the ruptured disc upon his spinal cord.

In addition to having trouble keeping his balance and walking in that way, he would have a tendency to stagger as though he had been drinking, although the evidence will show that for many, many years, Mr. McQueen has not drunk anything at all of any alcoholic nature.

He had severe headaches, and the effect of his injury upon him was that he felt addled or rum-dum, as they sometimes say; that he had a feeling of pressure, particularly in the back of his head and his neck, and a pulling feeling in the same area.

That with the passage of time he became terribly distressed, that he had difficulty with his memory, that he [12] had ringing in his head, and that he became so depressed that he had reached the verge of suicide.

The evidence will show that in addition to the twitching of the muscles in his neck caused from this injury, that particularly in the area of the muscles at the base of his thumb was a similar twitching or fasciculation.

Mr. McQueen has been prescribed and has taken pain pills ever since the time of his accident.

The evidence will show that this operation on this disc by Dr. Norcross did prove what the true diagnosis was, that the trouble was coming from this ruptured intervertebral disc, and that it was the

cause of part of the pain and the twitching in the thumb and in the legs, and of that feeling of weight and pressure on his neck and head.

I neglected to state that before the operation he also had an electric sensation where something like an electric shock would run from his neck down his arm to his thumb, and I believe on some occasions some of the other fingers. And he also had a feeling of electric shock from his neck running out to both sides, to the lobes of both ears.

The evidence will show that after the operation that feeling of electric shock down his arm and to both ears was corrected and that in itself does not bother him at the present time.

So that at the present time, the evidence will show that [13] Mr. McQueen is improved by this operation, but that he still is in a condition of total disability. He still requires and the doctors prescribe for him pain pills, No. 3 codeine pills. He finds it necessary to rest. His neck hurts him, particularly on tilting his head back or looking up. He has a feeling of tiredness and ache in his neck and in his shoulders and such a simple thing as using a razor to shave in the morning leaves him all tired out.

He finds that he cannot turn his head as he was able to do before his accident. And as a result of the surgery performed on him he is also having some present difficulty with anemia, for which he is getting treatment from a specialist in that field.

He still has the ringing in his head. It is somewhat difficult for him to hear at times. He finds

that holding up his elbows or elevating his shoulders is some relief to him.

His headache situation has improved. The situation in his legs in the matter of keeping his balance has improved, but he still has some distress in walking and considerable distress when he tires out during the day.

The evidence will show that Mr. McQueen had worked regularly for the Southern Pacific Company. In the past he had sustained a broken toe on one occasion.

Another time he was incapacitated for a while with the flu. Once while working for Southern Pacific he was hit on the [14] head with a rock but lost little time because of it.

As a boy, at about the age of 9, he bumped his head on a timber, on a nail that was protruding, and apparently a part of the head of the nail is embedded under the scalp near the skull bone. However, that has not caused him any difficulty or disability.

In 1955 he had some difficulty with sinus trouble, but after medical treatment it cleared up completely.

His earnings, the evidence will show, from Southern Pacific Company in 1954 were $7,266; in 1955, $7,077; in 1956, $7,385; and in 1957, up to the time of the accident, in January he made $492, in February, $579, in March, $647, in April $742, in May $738, giving him a monthly average for 1957 of $639.96.

Multiplying the monthly average by 12 to cover

the two-year period from the time of the accident up to the present, the wage loss is $15,359.04.

In addition, he has three bills from the Peralta Hospital, one in the sum of $1,359.07, another for lab work of $11.72 and another for lab work of $40.00. [15]

A Dr. Carlton, who did the anesthesia, has a bill of $90.

After the operation, one of these "staph" infections, I believe it is called, set in in the area of the wound, and it was necessary that the wound be reopened and that special isolation technique measures be followed, not only to cure it so far as he was concerned, but to keep it out of the rest of the hospital, and he had to have special nurses during that period. So that there are four nurses' bills of $60, $20, $100, $100, and another laboratory bill of $2. Then Dr. Norcross' fee for performing the myelogram. I think I have made a mistake here. Let me check, your Honor. No, the fee for the myelogram was $50. The fee for the surgery performed by Dr. Norcross, called a laminectomy, was $750.

At the time that the infection set in in the neck, Dr. Norcross was attending a neurosurgeons' meeting, and a Dr. Siefert was the doctor who reopened the wound during that period on two occasions, I believe. His fee or bill in the circumstances is $170, so that the total of the loss of wages and the medical bills is something over $18,000.

At the time of his accident at age 63, Mr. McQueen had a life expectancy of 15.62 years, and at

the present time at age 65, a life expectancy of 14.40 years, according to the 1937 Standard Annuity Table. Mr. McQueen had planned to continue working for Southern Pacific Co., and the evidence [16] will show that there is no compulsory retirement age for a man in his position with Southern Pacific Co. The evidence will show that Mr. McQueen is all through railroading, that that's the only kind of work that he knows, that his spinal cord damage does not regenerate, there is permanent damage there, and that his symptoms have continued as I indicated previously, in brief. So he still has pain and difficulty and disability. And I should mention that one of the unfortunate results of the infection was that it, in itself, caused further scar tissue in the region of the neck, and that in itself is a further cause or source of pain.

When we have concluded the evidence here and his Honor has instructed you, and we lawyers have argued the case, we will ask that you bring in a verdict for a fair and proper sum for Mr. McQueen.

Mr. Martin: May I reserve my opening statement, your Honor?

The Court: Very well.

Mr. Hepperle: Will the man from the hospital come forward, please?

The Court: Well, do you have to go through any rigmarole? You have got some hospital records here?

Mr. Hepperle: Yes, your Honor, and X-rays.

The Court: Why don't you just have them marked in evidence? [17]

Mr. Martin: I have never seen them, your Honor. I would like to have them marked for identification.

The Court: I mean marked for identification.

Mr. Martin: Yes, sir.

The Court: You waive presentation by any persons?

Mr. Martin: Oh, yes.

The Court: Just have them marked.

The Clerk: Plaintiff's Exhibit 1 marked for identification.

(Hospital records and X-rays marked Plaintiff's Exhibit 1 for identification.)

Mr. Hepperle: Mr. Murdock, will you come forward, please?

RICHARD M. MURDOCK

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: Richard M. Murdock.

Direct Examination

Q. (By Mr. Hepperle): Where do you live, Mr. Murdock? A. Pleasant Hill, California.

Q. Are you appearing here today under subpoena? A. I am. [18]

Q. Are you employed by Southern Pacific Co. as a fireman? A. I am.

(Testimony of Richard M. Murdock.)

Q. How long have you been so employed?

A. Since September 6, 1941.

Q. And since first going to work for Southern Pacific Co., have you taken and passed the examination for promotion to engineer?

A. I have.

Q. And when were you so promoted?

A. December 6, 1952.

Q. Do you recall an accident on May 29, 1957, at about 3:50 p.m.? A. I do.

Q. Were you the fireman on a freight train at that time? A. I was.

Q. Who was your engineer?

A. Bert Armstrong.

Q. Is Mr. Armstrong now deceased?

A. He is.

Q. Were you and the engineer riding in the cab of the locomotive of that freight train?

A. We were.

Q. Did you also have a head brakeman in the cab of the locomotive, a Mr. Kaiser?

A. We did. [19]

Q. Now, just before this accident took place, do you have an estimate as to the speed of the train?

A. About six miles an hour.

Q. State whether or not the slack in the train was stretched at that time. A. It was.

Q. Now, what, if anything, happened in respect of a signal?

A. The indication was changed from green to

(Testimony of Richard M. Murdock.)

red approximately two or three car lengths before we reached it.

Q. And after the signal was so changed to red, what was done?

A. The engineer made an emergency application of the brakes in order to stop short of the signal.

Q. Was such an emergency stop made?

A. It was.

Q. Did the engine stop short of the signal?

A. It did.

Q. Now, having in mind your experience, Mr. Murdock, both as a fireman and as an engineer, can you tell us what the effect of such a stop on a train consisting of 92 cars would be in the caboose?

Mr. Martin: Well, I don't think there is any foundation for that, your Honor. The caboose is 92 cars away. I don't know that this gentleman has ever been in the caboose.

Mr. Hepperle: I can go into further foundation if your Honor desires. I think the experience of the witness [20] himself entitles him to give us an answer here under the decision, since he qualifies in the form of an expert, your Honor, on train operations.

The Court: Well, are you familiar with the effect on a caboose?

The Witness: Yes, I am, your Honor.

The Court: You have been in a caboose?

The Witness: I have. I have ridden in them several times.

The Court: You may answer.

(Testimony of Richard M. Murdock.)

Mr. Hepperle: Will you read the question, Mr. Reporter?

(Record read by the reporter.)

A. (By the Witness): Very violent. Extremely violent. Very much like hitting a rock wall.

Q. (By Mr. Hepperle): Now, as an engineer and a fireman, state whether you have had particular training in the operation of a train to prevent such violent action. A. Yes.

Q. In this instance, when the signal was changed from green to red, state whether or not the engineer was required to make this emergency stop.

A. Under the rules, yes.

Q. And if he passed the signal, state whether or not he would *have subject* to discipline. [21]

A. He would.

Q. State whether or not upon final arrival at Oakland you were notified of the injury of Mr. McQueen. A. We were.

Q. And did you make out a Southern Pacific Form 2611 Accident Report at that time?

A. Yes.

Q. Have you ever been contacted since by anyone of the Southern Pacific Law or Claims Department about this accident? A. No.

Mr. Martin: I don't believe that is material, your Honor. We have stipulated the stop was made. That isn't negligence.

The Court: Well—This is all of the witness?

Mr. Hepperle: Yes, your Honor.

The Court: You wish to ask any questions?

(Testimony of Richard M. Murdock.)

Cross Examination

Q. (By Mr. Martin): Mr. Murdock, just one thing. Do I understand there were three units of diesel on this train? A. There were.

Q. And of course you and the engineer would be riding in the leading unit?

A. In the lead unit.

Q. That's where the controls are for the whole train, is that correct, sir? [22]

A. That is true.

Q. And the other two units, would they?

A. In this case they were.

Q. Yes. And your run was from Roseville to Oakland, is that correct?

A. Roseville to West Oakland.

Q. And where in West Oakland would your terminus or terminal be?

A. You mean where the train finally stopped?

Q. Where you would stop the train and the crew would get off.

A. Well, it would be at the West Oakland Yard. Not the desert unit, the West Oakland Yard. I can't recall the name of the street where it ends at, but it is the West Oakland Yard.

Q. I see. Did this occurrence take place shortly before you had completed your run? A. Yes.

Q. Would it have been within a couple of miles of where you——

A. Yes. I would say between one and two miles.

(Testimony of Richard M. Murdock.)

Q. I see. So therefore, I take it that it occurred within yard limits, is that correct?

A. It did occur within yard limits.

Q. And it occurred in daylight, did it? [23]

A. It did.

Q. About what time of day was it?

A. I believe 3:50 in the afternoon.

Q. And Mr. Murdock, the brake mechanism of that train is controlled in what fashion? What kind of a——

A. Well, the engine brakes are separate from the—they have an automatic brake valve that controls brakes on every wheel of the train, the automatic brake valve controls.

Q. To shorten this up, do you have an air line that runs through the entire train?

A. We do.

Q. And each car in that train has its own air brakes? A. It does.

Q. And by a lever in the engine, you can, by means of exhausting air throughout the train, apply the brakes in each car in the train?

A. Very true.

Q. And when you apply the brakes, not only in emergency but in any situation, that is how it works: The brakes set up on every car?

A. It is the principle.

Q. And do those brakes apply simultaneously or do they apply from the head end first?

A. They apply from the head end first.

Q. And when the application, as I understand

(Testimony of Richard M. Murdock.)

it, is made [24] by exhausting the pressure—is that right?

A. That's right, venting the pressure.

Q. Venting the pressure? Do I understand that you have, in the course of your duties, had considerable experience riding in cabooses?

A. Not considerable experience; we deadhead in cabooses a number of times.

Q. I see. Isn't it true, sir, that when the air is applied in a train, you can hear the escaping of the air from the caboose?

A. I don't ever recall that.

Q. You do not recall that? Did you ever make any note of that? A. I never did, sir.

Q. You never made it a point to observe that?

A. You can hear the brake shoes applied on the wheels, the grinding noise, but you don't hear the air vent.

Q. Can you hear the air brakes applying or being set up on the cars ahead of you?

A. In an emergency application, sir, you can actually hear the AB brake valve vent. They go "Pow!", like that.

Q. I see.

A. And in a case of an emergency. In the case of a service application, they do not. There is no venting noise whatever. [25]

Q. Well, then, we will take an emergency application. There is a vent that makes a noise, is that right?

A. There's an AB valve, and in an emergency,

(Testimony of Richard M. Murdock.)

every car has an emergency cylinder that vents the air and allows the cylinders a full run, in other words.

Q. And when that occurs in emergency application, that is when the air is completely exhausted as rapidly as possible,——

A. As rapidly as possible. The term is "a big hole," in the railroad.

Q. It makes a noise which can be heard inside the caboose, is that correct?

A. You should be able to hear the AB go then, in the case of emergency. Not in the service application; there's no noise involved, only the grinding of the shoes on the wheels.

Q. The application here was emergency, wasn't it? A. It was an emergency application.

Q. And what do you do? Do you hear them popping off ahead of you before they hit you?

A. Almost simultaneously; not quite.

Q. I see. And then I take it that the slack action you speak of occurs when the cars in front are banging up against one another, is that right?

A. That is true.

Q. So the first car would bang up against the engine, the following car would bang up against that, and all the way down the line for 92 cars, is that right? A. That's right. [26]

Q. And of course that takes much longer in time than for the exhaustion of air to the emergency brake, is that not true?

A. Yes, it would take a little longer perhaps.

(Testimony of Richard M. Murdock.)

Q. When you drop brake pressure at the head end of a train by means of an emergency application, the drop in pressure travels approximately at the speed of sound, does it not?

A. Well, I wouldn't be an expert on exactly how fast it went on that.

Q. But it is quite rapid, isn't it?

A. It would be quite rapid.

Q. Whereas the mechanical banging up of the cars, of course, is much slower, is it?

A. Yes, it would be slower.

Mr. Martin: I think that's all. Thank you.

Redirect Examination

Q. (By Mr. Hepperle): In the case of an emergency stop with a train of 92 cars, is there any warning sound in the caboose before the caboose stops?

A. In the case of an emergency application?

Q. Yes.

A. There's a possibility, as I said before, that you might hear the AB brakes go.

Q. And state whether or not that would be simultaneous with the stop of the caboose. [27]

A. That's a difficult question to answer.

Q. Would it be almost simultaneous?

A. Almost.

Mr. Hepperle: That's all.

The Court: That's all.

(Witness excused.)

Mr. Hepperle: May Mr. Murdock be excused, your Honor?

The Court: Very well.

Mr. Hepperle: Mr. Ward, will you come forward, please?

EUGENE B. WARD

called as a witness by the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: My name is Eugene B. Ward.

Direct Examination

Q. (By Mr. Hepperle): Where do you live, Mr. Ward?

A. I live in Orangeville, California. That's near Folsom.

Q. And are you appearing here today under subpoena? A. Yes, I am.

Q. Are you employed by Southern Pacific Company? A. Yes, I am. [28]

Q. How long have you been so employed, and in what capacity?

A. Since 1930 as a brakeman and since 1942 as a conductor.

Q. On May 29, 1957 at 3:50 p.m., were you the conductor on a train entering West Oakland?

A. I was.

Q. And did that train consist of 92 cars and the cars themselves weigh 4,063 tons?

(Testimony of Eugene B. Ward.)

A. That's correct.

Q. Now, immediately before this accident, or let's not say "immediately before," but on various occasions before the day of this accident, had you worked with Mr. McQueen?

A. On a few occasions; not too many times.

Q. Had you, while working with him, observed him perform his duties and noted his general appearance? A. Yes.

Q. What was his appearance before this accident, so far as his physical condition and health were concerned?

A. Well, he appeared to be in good health and in good spirits. I couldn't see anything different than any other time that I have been with him.

Q. Now, taking the period immediately before this accident, had you yourself practically finished making out your reports?

A. I had completed the biggest part of the reports and the rest would be finished in the office.

Q. And what position did you occupy when you were filling [29] out your reports?

A. Well, I would be sitting in a chair at the desk, facing the wall on the south side of the caboose.

Q. And is that desk and chair provided for that very purpose, of the conductor making out his reports? A. It is.

Q. Immediately before the accident, had you left your position at the desk?

A. I had finished my reports that I had at that

(Testimony of Eugene B. Ward.)

time and moved across on the west side of the caboose and sat on a locker.

Q. What, if anything, did Mr. McQueen do at that time?

A. Well, after I had moved, Mr. McQueen had a few chores to do like taking down the markers and various other things. Then he decided that it was necessary to leave a note for the caboose supplyman to place new supplies on the caboose while it was in the yard.

Q. And did Mr. McQueen begin to write such a note?

A. Yes, he sat down at the desk and picked up a pencil and commenced writing.

Q. How long had he been in that position before the accident took place?

A. Well, I would say not more than—less than one minute.

Q. Immediately before the accident, what in your estimation was the speed of the train?

A. I estimated the speed at seven miles per hour.

Q. Now tell us what happened when the accident took place.

A. Well, those things happen so suddenly that you don't have time to think hardly. It's almost an instantaneous happening.

The Court: Well, he wants you to tell us what happened.

The Witness: Well, it threw me violently over on my right side.

The Court: He wants to know what happened.

(Testimony of Eugene B. Ward.)

The Witness: Oh, I see. Well, I heard the air, the tripping valve make this peculiar hissing sound that they make when all the air is reduced, and then came the impact right following it, almost immediately.

Q. (By Mr. Hepperle): Now state whether or not the stopping of the caboose was violent.

A. Well, it was very violent.

Q. From the time that the caboose was traveling, according to your estimate, seven miles per hour to the complete stopping of the caboose, what kind of a time interval was there?

A. Well, from the time that you hear this air valve tripping, it is just a matter of a split second before the impact, before we were thrown down.

Q. State whether or not there is any warning, or was there any warning on this day of this violent stop?

A. No warning at all. This happens almost instantaneous. [31]

Q. Now, with respect to you yourself, state whether you were thrown.

A. I was thrown over on my right side onto the ladder.

Q. State whether or not there is a cushion or pad on that locker?

A. There was a cushion. I was sitting on the long cushion and it broke my fall.

Q. With regard to the impact or the violence of this stop, state whether you have ever experienced a more violent stop than this one.

(Testimony of Eugene B. Ward.)

A. Well, I have experienced lots of those stops and at that speed and at that particular time I don't believe I could say that I ever experienced a more violent stop.

Q. State whether or not this stop constituted rough handling of the train.

A. Well, yes, it would.

Q. What, if anything, did you notice with respect to Mr. McQueen when this violent stop took place?

A. Well, I was sitting directly behind him, facing his back, and he was thrown out of the chair that he was sitting in over to the right against the coal box. It protrudes a way out from the desk and he was crumpled up into this coal box when I picked myself up and was able to give him some assistance.

Q. What was his appearance at that time?

A. Well, of course he had his back to me, but he had all [32] the indication that, as hard as he struck the coal box, that he must have been injured severely.

Q. As you went to his assistance, did he make any complaints of pain or discomfort?

A. Yes, he stated that his right arm was hurting him, also his right side and his false teeth were broken; they had come out of his mouth. They had split right down the middle.

Q. After the accident, did the train then move on into its final destination in the yard?

A. Yes, it did.

(Testimony of Eugene B. Ward.)

Q. And did you and Mr. McQueen then leave the caboose? A. Yes.

Q. And where did you go?

A. I immediately went to the office. I dropped off the caboose; it was still moving; as it passed the office. I dropped off and went into the office and delivered the bills that I had of the train, the manifest bills, and proceeded immediately to the train master's office.

Q. Did you report the accident at that time?

A. I entered the train master's office and asked for the train master in charge. There was two men——

The Court: All he asked you, sir, was, did you make a report.

The Witness: Oh, yes.

Q. (By Mr. Hepperle): And did you request medical [33] assistance for Mr. McQueen?

A. Yes, I did.

Q. Were you informed that no doctor was available there at the West Oakland Emergency Hospital? A. That's right.

Q. Was an arrangement made by telephone to obtain pain medicine for Mr. McQueen and for the train master to drive him over to receive it?

A. Yes.

Q. Before you left there, did you make out a Southern Pacific 2611 accident form report?

A. I did, yes.

Q. Now, after the train master drove Mc-

(Testimony of Eugene B. Ward.)

Queen away, did you meet him later on that afternoon or evening? A. Yes.

Q. And state whether or not he complained of pain at that time. A. Yes, he did.

Q. And what, if anything, did you note as to his appearance at that time?

A. Well, he was in a very, very nervous condition and complained of these hurts that he had.

Q. Did you later go with him to his hotel?

A. I did.

Q. And did you do anything about leaving instructions [34] with the hotel manager?

A. I did.

Q. For medical assistance? A. I did.

Q. What did you do in that respect?

A. I talked to the hotel manager and told him that in my opinion the man needed medical attention and, if he would, he might look in on him and, if necessary, to call someone to provide medical attention for him.

Q. Did you the next morning learn that Mr. McQueen had been taken by ambulance to the Southern Pacific Hospital? A. Yes.

Q. In the afternoon or evening of this accident, —did you next see Mr. McQueen at my office on May 28 of this year, 1959? A. That's correct.

Q. Have you since the time of the accident ever been contacted by anyone from the Southern Pacific Claims or Law Department about this accident?

(Testimony of Eugene B. Ward.)

Mr. Martin: Objection to as immaterial, your Honor.

The Court: Sustained.

Mr. Hepperle: We think it is material, your Honor——

The Court: Oh, it doesn't make any difference whether they contacted him or not. It has no effect upon their responsibility for the accident.

Mr. Hepperle: That is all. [35]

Cross Examination

Q. (By Mr. Martin): Mr. Ward, do I understand that you were seated on a locker at the time of this occurrence?

A. Would you please repeat that?

Q. Excuse me. I have a bad cold and I may have trouble being heard.

Did I understand that you were seated on a locker at the time of this occurrence?

A. Yes, that's correct.

Q. And were you seated so that you were facing in the direction of the motion of the equipment, or were you faced at right angles to the direction of the motion?

A. At right angles to the direction of the movement.

Q. Were you facing out or inboard?

A. I was facing across to the opposite side of the caboose.

Q. Was Mr. McQueen on the opposite side from you? A. Yes.

(Testimony of Eugene B. Ward.)

Q. And was he nearer the head end or the rear end from where you were sitting?

A. I believe, in remembering it, that I must have been approximately two or three feet toward the rear of the caboose from where he was sitting.

Q. And there was nothing between you, was there, to interfere with your vision? [36]

A. Nothing.

Q. And is this locker that you were sitting on—do I understand it is padded?

A. It has a regular locker pad on top of it approximately three inches thick.

Q. And is it padded at each side as well?

A. Not on the side. It is a long flat pad and you—it was stretched out flat on top of the locker.

Q. Oh. Is it something a man can lie down on?

A. If you are so inclined.

Q. I see. But I take it, then, that you were seated on this thing, is that right? A. Yes.

Q. And is there any—On your right-hand side, for instance, what is there, a partition of some kind?

A. No.

Q. Oh, there's nothing at all there?

A. Nothing.

Q. Except the end of the caboose?

A. Well, I would say from where I was sitting, ten feet toward the head of the caboose, there was a locker provided there for different things. In other words, the locker did not run clear to the caboose; only partially.

(Testimony of Eugene B. Ward.)

Q. Did you strike anything as a result of this collision?

A. No, I didn't, except I fell over sideways. [37]

Q. In other words, you went over sideways on the mat, is that right?

A. Over on my side onto the cushion.

Q. The cushion, pardon me. Did it knock you off your seat? A. I was sitting down.

Q. Well, did it knock you down to the floor?

A. Not on the floor, no; over on the locker.

Q. And I take it, then, that you struck nothing but the pad which you had been sitting on, is that right? A. That's correct.

Q. Was this a wooden caboose?

A. I believe so. I believe it was a wooden caboose, inside and out.

Q. The type with the cupola up on top?

A. That's right.

Mr. Martin: I think that's all I have.

Mr. Hepperle: That is all. May Mr. Ward be excused, your Honor?

The Court: He may be excused.

(Witness excused.)

The Court: We will take a brief recess at this time, ladies and gentlemen.

(Recess.)

Mr. Hepperle: We offer in evidence, may it please [38] the Court, the Southern Pacific Hospital records and X-rays.

The Court: Do you have them here?

Mr. Hepperle: Yes. I have just handed them to the Clerk, your Honor.

The Court: They may be marked for identification and either side can use whatever he wishes from them, if that is satisfactory.

Mr. Hepperle: Yes. Couldn't they go into evidence?

Mr. Martin: As I understand the procedure in this court through past experience, it is the procedure of the court that they don't go in evidence; they are simply marked for identification and either side can use them.

The Court: Yes, that is what I have done in the past. They are marked for identification and either side can use whatever they want to.

Mr. Hepperle: Perfectly fine, your Honor.

The Court: Plaintiff's Exhibit 2 for identification.

(S. P. Hospital records and X-rays of McQueen were marked Plaintiff's Exhibit 2 for identification.)

Mr. Hepperle: And we also offer in evidence a list of the earnings and a group of medical bills in this case.

The Court: Any objection to that?

Mr. Martin: May I see that? I understand the [39] earnings for the year are gross earnings without deduction for tax?

Mr. Hepperle: That is correct.

Mr. Martin: With that understanding, there is no objection.

The Court: All right.

(List of earnings and group of medical bills of Mr. McQueen, were received as Plaintiff's Exhibit 3 in evidence.)

[See page 183.]

Mr. Hepperle: Mr. McQueen, will you come forward, please?

HARRY J. McQUEEN

the plaintiff herein, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: Harry Joseph McQueen.

Direct Examination

Q. (By Mr. Hepperle): Where do you live, Mr. McQueen? A. At 1635—7th Street, Oakland.

Q. How old are you at the present time?

A. Sixty-five on May 11th.

Q. When and where were you born?

A. At Huron, Indiana, May 11, 1894.

Q. Are you a high school graduate? [40]

A. Yes.

Q. Have you for your adult life, with the exception of a few odd jobs, spent your employment in railroading? A. I have.

Q. When did you begin working for Southern Pacific Company? A. 1943.

Q. Were you later promoted to conductor?

A. Yes, I was.

(Testimony of Harry J. McQueen.)

Q. And did you, when your seniority permitted, work as a conductor for Southern Pacific Company?

A. Yes, always.

Q. Do the job opportunities available to a man depend upon his seniority?

A. Could I have that again, please?

Q. Do you have the seniority system for conductors and brakemen? A. Yes.

Q. And does the man with the greater seniority have the choice of the jobs available?

A. Yes, he does.

Q. On May 29, 1957, were you involved in an accident? A. Yes, I was.

Q. Taking the time immediately before it occurred, were you and Conductor Ward riding in the caboose of a freight train entering the Oakland yards? [41] A. Yes.

Q. What did you do immediately before the accident happened? A. Before?

Q. Yes. A. Immediately?

Q. Yes.

A. Well, I was sitting at the desk.

Q. Taking a point a little bit before that, had your train come to a stop?

A. Yes, the train had come to a stop.

Q. And what, if anything, did you note at that time with respect to signals?

A. Well, the signals were red.

Q. Then did you later notice that the signals were cleared for your train? A. Yes.

(Testimony of Harry J. McQueen.)

Q. Does that mean they were turned from red to green? A. Green and yellow.

Q. Did your train then start up again?

A. It started up. I don't know just how long we were there.

Q. What, if anything, did you do from that point on, would you tell us?

A. Well, as soon as we got the signals and the train [42] started, I, as a habit, checked through the cupola. I checked the signals, that they were in proper condition, which was green, and the farther signal was yellow. That is still a clear signal. Then I took my markers, locked the cupola and got down below.

Q. When you say "the markers," is that those little lights that hang on each side of the rear of the caboose?

A. It designates the rear end of a train.

Q. Immediately before the accident, what speed, in your estimation, had the train attained?

A. Well, I should say eight miles an hour. You can never determine that. Seven or eight miles an hour.

Q. State whether or not your train was stretched at that time? A. Yes, it was.

Q. Now, we have had some mention of slack action but, in order to have a record from a witness, is there a certain amount of slack for each railroad car in a freight train?

A. Yes, you are allowed six inches on each car.

Q. Does that then mean six inches to a car?

(Testimony of Harry J. McQueen.)

A. Six to a car. That would be a foot between the two cars.

Q. Then that would be one foot for each car, having in mind a coupler on each end?

A. Yes. [43]

Q. Now, did there come a time when you sat at the conductor's desk?

A. Yes, I sat there at the conductor's desk.

Q. What was your purpose in sitting down there?

A. Well, it was my place to make out a slip order for supplies to the caboose man. That is, the caboose man, when the caboose got into the goose track, the caboose man was to fill my order.

Q. How long had you been sitting there before the accident happened?

A. Well, I couldn't just say exactly. I hadn't no more than got sat down. Maybe a minute or something similar to a minute. I don't know definitely the time. Very short.

Q. What happened when the accident took place?

A. Well, when the accident took place—I can hardly explain all of it, only I know there was an accident and all at once I was against the coal box, and I found later that I had hit my arm and head and injured myself.

Q. Now, you have mentioned being against the coal box. State whether or not you were thrown from your position in the conductor's chair.

A. Yes. The coal box constitutes the end of the desk, built in.

(Testimony of Harry J. McQueen.)

Q. Tell us what kind of a stop your caboose made at the time of the accident. [44]

A. Well, it was just now, just right now stopped.

Q. State whether or not it was violent.

A. Yes, it was violent, very violent.

Q. Was it an expected stop? A. No.

Q. Did you have any warning that such a stop was to be made? A. None whatever.

Q. Was this a normal or a usual stop?

A. No.

Q. How did you feel after the accident took place?

A. Well, I don't know how to put it. I was just sort of rum-dum and shook up and—I don't know just how to explain it all. I knew I was hurt, but as far as the extent of the injury, I don't know.

Q. Did you notice anything in relation to your teeth? A. Yes, my teeth were broken.

Q. And how about the right side of your face and ear?

A. Well, there was an abrasion, or abrasions, on the right side of my face from hitting the coal box. I presumed it was the coal box because that was the only thing I could have hit, the edge of it.

Q. And what about the condition of your right arm?

A. Well, presumably the right arm struck the grab iron. There is one on each side of the desk to hold to if you get a warning. There is a grab iron here (indicating) that I can [45] reach just like that and there is a similar one up on the right

(Testimony of Harry J. McQueen.)

side here (indicating). I went to that one because the stop was made that way.

Q. Did you have any trouble with your thumb at that time? A. I don't get that.

Q. Did you have any trouble with your thumb or your hand?

A. Yes, I hit my arm and in some way in the accident I was bent over and the thumb was injured. How, I don't know. It was a twist; I naturally supposed it was when the arm hit the grab iron. The force was so great that I kept going up against the desk and hit my thumb or mashed it with my body. I don't know how it was.

Q. We have covered with Mr. Ward the matter of your train then completing its journey and coming to a place where you went to the yard office and emergency hospital. How did you feel at that time, Mr. McQueen?

A. Well, I just can't explain that. I had difficulty dismounting and, in getting off the caboose, you have to get off a caboose while it is going in order to get off at the yard office, and we dismounted at the yard office, which was the practice, and I had the brakeman or somebody went around there with me. I wasn't just clear on what was going on, what I was doing, that is, to the extent of how I was hurt or anything else.

Q. Did you seek medical attention there at the emergency [46] hospital?

A. Yes. No one there.

Q. You say no one was there?

(Testimony of Harry J. McQueen.)

A. No one was there.

Q. What did you next do?

A. Well, the only thing left was to go back to where the conductor was and the train master to see what disposition they was going to make, and send for a doctor. [46-A]

Q. We have covered through Mr. Ward the matter of the trainmaster telephoning the doctor and then driving you to the drugstore for pain pills and then to your hotel. How did you feel by the time you got to your hotel?

A. Well, I was still sort of in a daze. I don't know. I was just all shook up. I don't know how to explain just how I did feel, only I wasn't feeling normal by a long ways.

Q. With the passing of time did you get better or did you get worse? A. I got worse.

Q. Did you telephone in to lay off from your job? A. Yes, I did.

Q. Later, was an arrangement made to send you to the Southern Pacific Hospital in San Francisco?

A. Through my assistance, yes.

Q. And was that later on that evening?

A. Around 12:00 o'clock midnight.

Q. How did you come to the Southern Pacific Hospital here? A. Ambulance.

Q. And what was done for you at that time at the hospital?

A. X-ray pictures, and I took a dose of my own medicine, and that's all.

(Testimony of Harry J. McQueen.)

Q. Is that the same medicine the doctor had prescribed over the telephone?

A. That's right. [47]

Q. Did you stay at Southern Pacific Hospital?

A. Yes, I stayed there until they got the X-rays taken, and then bundled me up in a taxicab and sent me down to the pier to go home, but there was nothing going until around 6:00 o'clock.

Q. Did you then go to a hotel?

A. Yes, I did.

Q. What was your condition the next morning?

A. Well, it was—I don't know. I felt like going back to the hospital, I was feeling so bad, but then I knew they wouldn't let me get in there, so I went and called up the hotel and made arrangements for somebody to come over and get me. I never felt like riding a street car or anything like that.

Q. Did you then, with the passage of time, report on various occasions as an out-patient to the Southern Pacific General Hospital?

A. When required.

Q. And were there other periods when you were kept there as a bed patient? A. Yes.

Q. Now, we have mentioned the matter of an operation this year. Taking your condition from the time of the accident up to the time of the operation, will you tell us what bothered you and in what respect?

A. Well, I had lost my sense of balance, and then there [48] was a ringing in my ears and a sensation into my arm, it was swollen, and I couldn't

(Testimony of Harry J. McQueen.)

walk. I would start out and be going along for a couple of steps and I would have to go to the right and then I would have to go to the left to right myself, and that continued up until the time I was relieved from it by the operation.

Q. Taking the matter of your balance again, state whether or not you staggered at times.

A. Yes, I did.

Q. Now, for a period of years had you refrained from drinking any alcoholic beverages?

A. Yes. None whatever.

Q. What did you do to try to keep your balance when walking, with your feet?

A. Well, I had to brace my feet. Every time I made a step I would have to, just a natural inclination to protect myself, because it was sort of like a dizziness that I was going to go this way or was going to fall, so when I would step I would use the inside of my feet to hold my balance.

Q. What was your condition with respect to headaches?

A. Well, from the accident I had continual headaches and been taking the limit of strong medicines that they gave me. Just aspirin or something like that won't relieve it—wouldn't relieve it any.

Q. What part of your head did you have the headaches in? [49]

A. It was on the back of my head, up in here (indicating), in the back and the top. Well, not the top. In through here (indicating).

(Testimony of Harry J. McQueen.)

Q. What was your condition with respect to your neck?

A. Well, the neck, that seemed to be where the trouble all started, in my neck. There was a sort of a tension, like something was pulling me or pushing me. It was all in the back in here, with an exceedingly lot of pain with it at all times and distress.

Q. With the passing of time were you cheerful or otherwise? A. How is that?

Q. Were you cheerful? Were you in good humor? Did you feel good?

A. Well, I tried to pretend I was, but I wasn't. I tried to keep in as good humor as I could, but I was depressed all the time.

Q. State whether or not you found it necessary to rest. A. Yes, I did, always.

Q. Did you note anything with respect to your memory?

A. Well, I just can't remember. My memory is not what it was when I got hurt. I just don't know, I can't remember past dates and incidents that have happened that in the usual procedure I would remember everything.

Q. Did you have any trouble with your vision?

A. Yes, I had trouble just after I got hurt. It was, well, [50] on the left of me and it appeared like a concave or like a ditch in the sidewalk, or wherever I happened to be going.

Q. Did you notice anything with respect to moving objects?

(Testimony of Harry J. McQueen.)

A. Yes. I couldn't cross the street and put my eyes on an object. If I put my eyes on an object, why, I would sort of fall over. If I would see an automobile, like there was someone in it and I would try to follow them like that with my eyes, I would get over-balanced.

Q. Did you have any trouble with the muscles at the base of your thumb? A. Yes, I did.

Q. Tell us about that, please.

A. Well, they twitched just like an electric shock in there, and I had a dead sensation where I struck my arm down here, and the sensation would go out into this part of the thumb here. It was visible. It would just tremble at all times through the whole two years. And the other one would come to here and would jump out in there into the fingers, which was very peculiar. But there was no great pain or anything to it, except in the thumb. It was just that it kept me in suspense all the time, and I noticed it bothering me always.

Q. Did you have anything in the way of an electric sensation?

A. Yes, that was sort of electric there, and that was in the arm and run down in my ear lobes. Very painful, but it [51] wouldn't last, oh, we will say half a minute.

Q. How many times a day would it occur?

A. Oh, sometimes two or three times a day, something like that, in 24 hours. I never kept no track of it. It would just hit me every now and then during the spell of sickness I had.

(Testimony of Harry J. McQueen.)

Q. Now, after the operation by Dr. Norcross, what, if anything, did you note was improved in your condition?

A. Well, when I got up and out of the bed I walked, which was a great surprise to me, and my balance was all right. I was 90% improved, anyway. Still, I have a little trouble. I don't know what to attribute that to, but it might be on account of this operation I had, because I have a lot of pain yet in the shoulders, and tiredness and weakness all the time. I am not strong.

Q. Did you notice any change after the operation with respect to the headaches and the feeling in the back of your head and neck?

A. They completely left. None whatever. I didn't have any since I got out.

Q. Is that the headaches that you speak of?

A. Yes. No headaches at all. They all left and the balance returned.

Q. Now, since the operation do you have any trouble at all with your neck or with your shoulders? [52]

A. Yes. That's what I speak of. It is—well, I seen the doctor—is it permissible to talk about the doctor?

Q. I think we better let the doctor cover that. You just tell us what you yourself——

A. Anyway, I am just tired all the time. If I shave or if I do something, it fatigues me out. I can't do anything at all without I am just completely played out. As far as being a man is con-

(Testimony of Harry J. McQueen.)

cerned, or anything in the working condition, I am just not there.

Q. Is the feeling in your neck any different now than it was before the operation?

A. Yes, it's a different feeling altogether. Mostly in a different place.

Q. Do you have any difficulty looking up or tilting your head up? A. Yes, I do.

Q. What difficulty do you have?

A. Well, when I look up, it seems where the operation was, where the disc was taken out or attended to, whichever the case was, I have a pain when I look back or look up too much or turn around too much one way or the other. [53]

Q. Are you able to turn your head or your neck as you were able to before the accident?

A. No. No.

Q. What about—I am not sure that I asked you about before the operation—did you have anything with respect to ringing in your ears or head?

A. Before?

Q. Yes. A. No.

Q. Before the operation, that is, after the accident, but before the disc operation, did you have any ringing in your ears?

A. Yes, always. I thought you was speaking about the accident.

Q. Did the operation do anything to help that sensation?

A. Well, the ringing is still in my ears, but the sensation like it was in my hands is all gone.

(Testimony of Harry J. McQueen.)

That is, the center of my head from both ears in, there was a sensation going into my head, and that sensation has stopped with the hand, but the ringing still continues in my ears always.

Q. Since the operation do you have any difficulty in walking or getting about?

A. Since the operation?

Q. Yes. Aside from the matter of balance, which you say returned, do you have any other difficulty in walking or [54] getting about?

A. Well, I can't step as quick and I am not so sure of myself on account of this distress feeling I got in my neck. That's the only reason. But I can step just as good as anyone, you know, but not sure of the step.

Q. Before the accident, what was your condition of health and physical condition?

A. Well, it was O.K., I guess.

Q. Had you ever sustained any serious accidents before the one that this lawsuit is about?

A. No.

Q. Had there been a time years ago when you had broken a toe? A. Yes.

Q. Did you recover completely from that?

A. Yes.

Q. Had you lost some time on another occasion because of the flu? A. Yes.

Q. And was there another occasion when you were hit on the head with a rock while on duty?

A. Yes.

Q. State whether you recovered from that.

(Testimony of Harry J. McQueen.)

A. Oh, yes. I continued work on it.

Q. In the year 1955 did you get some treatment for a [55] sinus condition? A. Yes.

Q. State whether or not you were cured?

A. Yes, I was.

Q. Now, was there any compulsory retirement age on the Southern Pacific for conductors or brakemen? A. No.

Q. Before this accident took place what had been your plans with respect to continuing working?

A. Well, I expected to keep busy as long as I could and was in good health.

Mr. Hepperle: You may cross-examine.

Cross Examination

Q. (By Mr. Martin): Mr. McQueen, you had this operation performed by Dr. Norcross of Oakland, is that right, sir? A. Yes.

Q. And that was done at the Peralta Hospital in Oakland? A. Yes.

Q. And according to the records here, you were in that hospital from about March the 31st until about April the 5th; is that about right?

A. That's right.

Q. And you were operated on on April 1st, is that about right? [56]

A. I believe that's right, April.

Q. So you have only been discharged from the hospital for a little over a month prior to today; is that correct? A. How would you say that?

Q. I say you have only been out of the hospital

(Testimony of Harry J. McQueen.)

for a little over a month, prior to the present time; is that correct?

A. Well, whenever the dates were.

Q. Yes. A. When I left there, yes.

Q. And are you still under Dr. Norcross' care?

A. Well, in a way, yes. I am to report back to him on this operation and I——

Q. How often have you seen him since you got out of the hospital?

A. Three times, I believe.

Q. I see. And the last time you saw him was when? A. About a week ago.

Q. Does he do anything more than look you over and ask you how you feel?

A. Yes, he examines me and looks at my neck.

Q. But he doesn't give you any treatment; is that right, sir?

A. He just prescribes pain pills for me.

Q. I see. Now, Mr. McQueen, getting back to the happening of this accident, that occurred in the West Oakland [57] yard, is that right?

A. Yes.

Q. And as I understand it, you were seated at a desk which is the conductor's, you might call it, working space, is that correct, sir?

A. Conductor's desk.

Q. Yes. That's where he does his paper work, is that right? A. That's right.

Q. And the only two people in the caboose were you and the conductor, Mr. Ward, is that right?

A. There was no one, only the two of us.

(Testimony of Harry J. McQueen.)

Q. Yes. And you had been on this run from Roseville to Oakland and it was toward the end of the run, is that right? A. Yes, Oakland.

Q. And was this a regular run for you? Did you have a regular job on that run?

A. Yes, regular.

Q. And this caboose that you were in was a wooden caboose, I believe the testimony has been?

A. Inside and out.

Q. As distinguished from the metal ones that we see from time to time, now, is that right?

A. I didn't understand.

Q. I say they have wooden ones and metal ones, don't they? [58]

A. Oh, yes, wooden and metal, all steel frames, whatever you term them. Three or four kinds.

Q. And I believe you said there were grab irons located to your left and right as you were seated in this caboose, is that correct, sir?

A. That's right.

Q. What are grab irons?

A. Place to hold on.

Q. And were they close enough to you so you could reach and hold onto them with either your left or right hand if you had wished to?

A. Well, you have to be pretty much stretched out. The idea of them is that you have one on each corner, so if you are going in this direction, the caboose is never turned around completely, so as to serve you either way, that you may grab and hold or grab and push to save yourself.

(Testimony of Harry J. McQueen.)

Q. I see. And as I understand the testimony in this case you weren't holding onto either grab iron, is that correct, sir? A. No, I was not.

Q. And isn't it true, Mr. McQueen, that the rules under which you operate require you to anticipate a sudden stop at any time when coming into yard limits?

A. Anticipate a sudden stop?

Q. Yes. [59]

A. I don't believe they read like that.

Q. I beg your pardon?

A. I don't believe they read just like that.

Q. Well, I was paraphrasing it. I think the rule, 2061 of the safety rules, provides: "On trains entering or leaving yards or when approaching places where a stop is to be made or speed reduced, take necessary precaution, particularly on cabooses, to avoid injury which might result from sudden, unexpected movement."

Is that the rule? A. That's the rule.

Q. And that's the purpose of the grab iron, is that correct, sir?

A. The purpose of the grab iron is to protect yourself.

Q. Yes. In this particular caboose that rule is posted right in the caboose, is it not, sir?

A. Well, there's some rules posted in there. I don't know whether it is that rule.

Q. Well, isn't that particular rule posted right above the conductor's desk there?

A. "Safety is a rule of first importance," and

(Testimony of Harry J. McQueen.)

such a rule is that, posted up in some of them. And some of them has got another rule.

Q. And some of them have this rule that I have just read posted, don't they? [60]

A. No, not that rule, I don't know.

Q. Have you ever seen that rule posted in a caboose?

A. Not that I recall. Not that rule.

Q. I see.

A. Your rule could be there, but I don't know the term of the whole rule. It's a safety rule.

Mr. Martin: May I approach the witness, your Honor?

The Court: You are going to have a few more minutes with this witness?

Mr. Martin: I imagine I will, your Honor, yes.

The Court: I have to swear in a new United States Attorney at 4:00 o'clock, so I think rather than get into this any further, we might take the adjournment now.

Mr. Martin: That's fine, your Honor.

The Court: And then you can give him that, because you may want to show this picture to the jury. I don't know what your plan is. Perhaps it would be better to do that in the morning.

Mr. Martin: Very well, your Honor.

The Court: Would you have all the doctor witnesses here on both side tomorrow so we can get this completed?

I have to perform one of the duties that a judge has to do right now, and that is swear in a new

United States Attorney, so we will have to go a little earlier today. [61]

All right, will the jury please return tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken until Tuesday, the 2nd day of June, 1959 at 10:00 o'clock, a. m.) [61-A]

Tuesday, June 2, 1959, 10:00 O'Clock A. M.

The Clerk: Harry J. McQueen versus Southern Pacific, further trial.

Mr. Hepperle: Ready, your Honor.

Mr. Martin: Ready, your Honor.

Mr. Hepperle: May we have the Court's permission, your Honor, to call a doctor at this time?

The Court: Very well. No objection?

Mr. Martin: No objection.

DR. NATHAN CROSBY NORCROSS

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your name to the Court and to the jury.

The Witness: Nathan Crosby Norcross.

Direct Examination

Q. (By Mr. Hepperle): Where do you maintain your offices, Doctor?

A. 400 29th Street, in Oakland.

(Testimony of Dr. Nathan Crosby Norcross.)

Q. Are duly licensed to practice as a physician and surgeon in the State of California?

A. I am.

Q. Do you specialize? A. I do. [63]

Q. And will you tell us, what is your specialty?

A. Neurological surgery.

Q. And what does the field of neurological surgery include?

A. It has to do with surgical treatment of various disorders and diseases of the nervous system, the brain, the spinal cord and the nerves of the body.

Q. Will you tell us something of your background and qualifications as a neurological surgery specialist?

A. I graduated from medical school in 1932. Following that, I took a year's rotating internship. After that for a year I studied in Europe. About half of that time I was in National Cancer Institute in Madrid, Spain, where I studied the microscopic appearance of nerve cells and various conditions.

Following that, for the other half of that year, I was in the National Hospital for Diseases of the Nervous System in London, England, studying the medical aspects of neurology.

The next two years I spent at McGill University in Montreal, Neurological Institute, as a research fellow in Neurophysiology.

Then, for three years I was with the University of Pennsylvania in Philadelphia. During two of

(Testimony of Dr. Nathan Crosby Norcross.)

those years I was the resident in neurological surgery at the University Hospital and for one year I was a fellow in research surgery [64] at the University of Pennsylvania Medical School.

I then completed my training and started private practice in San Francisco in 1939.

Q. Have you had military experience, Doctor, in connection with your specialty?

A. Yes, I was in the Navy for five years during the war. The first three of those years, approximately, I was neurosurgeon at the Mare Island Naval Hospital. For one year I was chief of neurosurgery at the Naval Hospital at Aiea in Hawaii, and for one year I was chief of the neurosurgical center at the Naval Hospital Center at Great Lakes.

Q. Are you, Doctor, a member of any of the neurological surgery societies?

A. Yes, I am a member of the Western Neurological Society, the Irving Cushman Society and the Academy of Neurology.

Q. Are you, Doctor, certified as a specialist by the American Board of Neurosurgeons?

A. I am. I was certified in 1941.

Q. Did you, Doctor, at our request, examine the plaintiff in this case, Mr. Harry McQueen?

A. I did.

Q. When did you first see him?

A. I first saw him December the 30th, 1957.

Q. At that time, Doctor, did you take a history of the patient? [65] A. I did.

Q. Without going into the details of the accident,

(Testimony of Dr. Nathan Crosby Norcross.)

Doctor, will you tell us what this patient's complaints were following the accident?

A. Following the accident his complaints were of immediate feeling sort of rum-dum or addled. He had pain in his right arm, headache, his right arm was swollen, and he had discomfort in his neck.

He was hospitalized, heat was given to his arm, which improved over a period of time except for the right thumb. That he immediately noted trouble in walking. That had continued.

By the time I saw him in December he was complaining of headache, chiefly in the back of the head and behind the eyes on both sides. He had a good deal of pulling of the back of the neck. He was unable to walk straight. He veered when he was walking, and in traffic or crowds he had to stop for fear of losing his balance.

Q. Did you then, Doctor, inquire into his past history? A. I did.

Q. Was there anything of significance in the past history?

A. Well, he had an osteomyelitis of his leg as a child that left a deforming scar on the leg. He had a number of minor injuries, one of them disabling him for perhaps two weeks, and that was about it. [66]

Q. Did you then, Doctor, make a neurological examination? A. I did.

Q. Would you tell us what the significant findings were upon the examination?

A. Well, the neurological examination did not

(Testimony of Dr. Nathan Crosby Norcross.)
have many clear-cut, significant findings. The most outstanding of these was the fact that he stood with a broad base, with his feet separated, because he was unable to keep his balance well. And as he walked, his gait was what we call ataxic. He veered, he staggered as he walked.

He showed fasciculation—those are little, small contractual trembling of the muscles of his legs and in the muscles of his right thumb.

Those were the outstanding findings at that time. The remainder of the neurological examination was not remarkable. He had an old scar on the right part of his head, the result of an injury he had as a child.

Q. What, if anything, did you note with respect to his neck, Doctor?

A. His neck was sore, spastic, tender, and showed limitation of movement.

Q. What, if anything, was revealed by X-rays of his neck?

A. X-rays of his neck revealed a good deal of osteo-arthritis. This is a type of arthritis that all of us acquire in varying degrees as we grow old. When I first saw him, he [67] was 63 years old. Perhaps it was not out of line for his age, although it was a little more marked than we frequently see.

Q. What, if anything, was shown by the X-rays of his neck, Doctor, with respect to the curve of the neck?

A. The X-rays of the neck show a reversal of the curve. The neck normally is curved fairly

(Testimony of Dr. Nathan Crosby Norcross.)

evenly, and in bending the neck we ordinarily find this curve to straighten out or become more accentuated.

In this particular case, there was a reversal of this curve at the level of the 5th and 6th cervical vertebrae, and this is a common finding and frequently does indicate muscle spasm in the neck.

Q. What is muscle spasm, Doctor?

A. A tight, sore, tense muscle that remains contracted instead of relaxed a great deal of the time, and because of this, amongst other things, it is usually painful.

Q. Following this examination, Doctor, did you form an impression at that time as to Mr. McQueen's condition?

A. Not a very definite one. It seemed apparent to me at that time that he had some disorder of his central nervous system, most of it apparently in the spinal cord. He had a very definite, decided cervical neuralgia. This is what I term this painful muscle spastic affair in his neck. The findings were consistent with that.

The evaluation of the fasciculations in the muscles [68] in his neck were difficult. They brought up the possibility of some degenerative disorder that had not been recognized, and at that time I was not sure what relationship they had to the injury that he had sustained.

Q. Did you later, Doctor, have an opportunity to review the Southern Pacific Hospital record of Mr. McQueen? A. Yes, I did.

(Testimony of Dr. Nathan Crosby Norcross.)

Q. With respect to the diagnosis shown on the record, Doctor, "CNS lues," will you tell us what that is?

A. That means syphilis of the central nervous system.

Q. State whether or not that diagnosis is substantiated by the findings in the records.

A. No, I don't think it was. This diagnosis was, I don't think, ever actually made. It was suggested because on one occasion he had a positive Wasserman reaction. Subsequently, many others were taken and none of them showed positive.

This is something that we have to face in medicine. [69]

There is no test we have that is completely sure and specific, and that includes a Wasserman reaction. I think we have to feel in this case that this was one of those unusual but not too uncommon false positives that we always have to check.

In this case nothing else was ever found. That is not adequate to substantiate a diagnosis of syphilis of the central nervous system.

Q. State whether there was any evidence of such a condition, Doctor, as shown by the neurological examination. A. No, there was not.

Q. Now, following the review of the Southern Pacific Hospital record, state whether you suggested that a myelogram examination be made.

A. Yes, I did. I felt that we could not make a definite diagnosis in this particular individual, and I further felt that further diagnostic studies

(Testimony of Dr. Nathan Crosby Norcross.)

were called for. I was not happy with the information we had. I think we should acquire more information in other ways.

Q. Did you, Doctor, before the myelogram procedure, re-examine Mr. McQueen on March 9th of 1959? A. Yes, I did.

Q. And what were his complaints at that time?

A. At that time his complaints were essentially the same. If anything, his legs were more ataxic. He didn't use them as well as he had before. [70]

He complained of occasional pain in the right arm still, and that was essentially it. In addition to his previous complaints, they had not changed significantly.

Q. Did you then, Doctor, have him admitted to Peralta Hospital? A. I did.

Q. Did you carry out the myelogram procedure?

A. I did on March 10, 1959.

Q. Will you tell us how that is done, Doctor?

A. Well, a myelogram is a special diagnostic X-ray test. Ordinary X-rays show bony detail. They show some soft tissue but not very much. Many things can occur to a body that the X-ray does not show. There are ways of enlarging the X-ray's values, and this is by use of various dyes that we may inject into various portions of the body.

In this case we injected a suitable dye into the lower spinal canal. The dye is heavier than the spinal fluid and, by tilting the patient up, we can run that dye up into the neck or even into the

(Testimony of Dr. Nathan Crosby Norcross.)

head, and we watch it as it runs because it is quite easy to see, and if it shows deformities or abnormal patterns, we can snap X-ray pictures and make a record of it.

Q. Now, in this instance, Doctor, what was revealed by the myelogram?

A. In this case there was a very definite indentation of this column of dye, chiefly at the level between the fifth and [71] sixth cervical vertebrae. This is in the lower part of the neck.

Q. Were X-rays taken to demonstrate that, Doctor? A. They were.

Q. And are they contained here in this envelope from the Peralta Hospital? A. They are.

Q. If you were to demonstrate them with the light box, could we, as laymen, see and appreciate what the finding was in this myelogram?

A. Yes, I think we have the change fairly clear in the myelogram.

Mr. Hepperle: May we have the doctor demonstrate, your Honor?

(Thereupon the witness left the witness stand and went to the shadow box on counsel table.)

The Clerk: Please speak loudly so the reporter and the jurors can hear you.

The Witness: We take a good many films in carrying out a test of this sort, and from those only some of them show us the changes that we are looking for.

This is an example of one. The patient is on

(Testimony of Dr. Nathan Crosby Norcross.)

his face. This column of dye is seen here within the spinal canal of the neck.

Now, he shows some little dents anteriorly here which [72] are consistent with the osteoarthritis that he has and which we often see. A little further down here, between 5 and 6, you will see a considerably larger indentation, a dent here that I will show you in some other films, more than we expect to see, and we can see that this is definitely abnormal.

Then, looking from another angle, we took more films. These are looking directly from behind the patient forward. I think you can see here at the base of the skull that in this area of the spinal cord this shadow is much less dense, showing that there is less of this dye there, and indicating a mass in that area that prevents the dye from flowing properly. The same thing is shown here.

It is also noted at this time that there is a slight indentation on both sides at this same level, consistent with the findings that we see where a disk is herniated, and these findings are more marked on the right side than they are on the left side.

The other film I don't think adds much. Again we see the same thinning at this level particularly and the indentation on both sides. There are other films that do not show these changes as clearly.

Mr. Hepperle: Thank you, Doctor. Would you resume the stand?

(The witness resumed the witness stand.)

(Testimony of Dr. Nathan Crosby Norcross.)

The Court: Have those films been marked already [73] for identification?

Mr. Hepperle: Yes, your Honor. The envelope is marked plaintiff's Exhibit 1. Should these three be given sub-numbers?

The Court: I think so, so as to indicate what films the doctor referred to.

(X-ray films just shown were marked Plaintiff's Exhibits 1-A, 1-B and 1-C for identification.)

The Clerk: Are they offered in evidence, counsel?

Mr. Hepperle: Yes, your Honor, they are offered into evidence.

The Clerk: Introduced and filed in evidence.

(Plaintiff's Exhibits 1-A, 1-B and 1-C for identification were received in evidence.)

Q. (By Mr. Hepperle): Now, following this myelogram procedure, Doctor, did you then have Mr. McQueen readmitted to Peralta Hospital?

A. I did.

Q. And what was the date of that next admission?

A. That would have been March the 31st.

Q. And while he was in the hospital on that occasion, what, if anything, did you do for him?

A. I operated upon him.

Q. And will you tell us what kind of an operation it was and what you did? [74]

A. This operation is called a laminectomy. The laminae in the spine are little arches of bone that

(Testimony of Dr. Nathan Crosby Norcross.)

cover the back of the spinal canal and, to get into the spinal canal, we have to remove some of these little arches. This is called a laminectomy or removal of the arches.

This lets us in the spinal canal and then we can deal with the contents of the spinal canal as we need to. The name itself does not signify completely what was done, but it's the general type of operation that was carried out.

We carried this out in this patient. We removed the spinal arches, the laminae of the 5th and 6th cervical vertebrae, the one lying just above and just below the area where we saw a shadow in the X-ray.

We entered the spinal canal. We opened the dura. This is a tough membrane that surrounds the spinal cord. And then by tilting the cord slightly to one side we were able to show a very decided mass that was coming backward against the cord from the area of the vertebral body in front. It was compressing the roots slightly and the cord even more so.

This same state of affairs was found on the opposite side. We then sectioned the dentate ligaments. These are small ligaments that hold the spinal cord in a fairly neutral position within the spinal canal. And in this case, because they do hold the cord, they were holding it forward against this mass that was pressing back against it, and in this way [75] bringing about a definite compression of the spinal cord.

After we had sectioned these ligaments, then the

(Testimony of Dr. Nathan Crosby Norcross.)

cord is able to move more freely within the canal, which is sufficiently large for it, and it was able to ride back away from this mass that was pressing upon it.

In this way, in a large part at least, we were able to remove the compression on the spinal cord. The wound was then closed up with sutures in the usual way.

Q. Following the operation, Doctor, were you able to make a definite diagnosis as to the cause of Mr. McQueen's difficulty?

A. Yes. Mr. McQueen had suffered a compressive disorder of the spinal cord caused by the disk disease that we had demonstrated that he had.

Q. Now, after the operation, Doctor, was there any change with respect to Mr. McQueen's condition, particularly respecting his legs?

A. Yes. Following the operation, almost as soon as he got out of bed and onto his feet, he stated immediately that his legs behaved as they should, or very nearly so, and he had lost his instability.

The lack of equilibrium was greatly improved, the lack was decreased and he was able to walk with a great deal of certainty, and he felt that he was far better than he had been before the operation.

Q. Do you have an opinion, Doctor as to whether Mr. McQueen's injuries and difficulties were caused by this accident of May 29, 1957?

A. I believe his disability was brought about by the accident of May 29, 1957, which by trauma to his neck and shoulders had brought about an aggra-

(Testimony of Dr. Nathan Crosby Norcross.)

vation of a condition that we are quite sure had been present before, but which had been symptomless and was giving him no difficulty. This injury, then, aggravated, upset and disturbed this state of affairs until it brought about the disability and changes that we found, which were, in part at least, helped considerably by the surgical procedure, that in part corrected the state of affairs which was found within his spinal canal.

Q. Doctor, would this diagram be of assistance in helping to explain the mechanism of the injury here and the cause of the complaints and the fasciculations in the legs and at the base of the thumb?

A. Yes, I believe it would.

Mr. Hepperle: May we put it on the blackboard, your Honor?

(Diagram placed on blackboard.) [77]

The Witness: This diagram shows a cross section of the area that we are talking about. The back of the neck is back here. The skin would be about in this area. These are those little arches of bone, the laminae, that I spoke of.

In our operation we came down this way and removed these laminae, took them out. Then we were able to come down on the dura, which is this little place indicated here in white.

We opened it and then were able to observe the spinal cord that lies here.

Now, I think you will see that this is indicated as a herniated disc, essentially the same type of thing that we found in this case. These are the vertebral

(Testimony of Dr. Nathan Crosby Norcross.)

bodies here. These discs lie between them. They should come along at about this level. They do bulge and herniate out, and they do, as you can see, press against the spinal cord, which is being held down by these two ligaments, one indicated there and one indicated here. It holds the cord forward against this mass and causes compression of the spinal cord.

By sectioning these ligaments, the cord is then able to ride back off this mass, and most canals are larger than this in relation to the size of the spinal cord, so if we can keep the cord from being held down against this mass, there is plenty of room in the spinal canal for the cord to float around more freely than it could before, and in this case we [78] were able to cut these ligaments and the cord floated back away from this mass and was then no longer compressed.

I might add that we usually leave these masses intact. Once in a while we are forced to tackle one, but it is tremendously dangerous to try to remove them because they are partially calcified, so as a rule we don't attempt it.

Q. Would you explain further, Doctor, the connection between the pressure on the spinal cord and the complaints and difficulty that Mr. McQueen had?

A. Well, the spinal cord consists primarily of many nerve fibers coursing on down to various portions of the body. Those fibers function fairly well except when they are squeezed or damaged in some fashion.

(Testimony of Dr. Nathan Crosby Norcross.)

In this case, or a case of this kind, where you are squeezing the spinal cord, you are getting pressure on many of the fibers within the cord and obstructing the function that is controlled by those fibers, in this case primarily the use of his legs. Secondarily, the introduction of these little fasciculations in the muscles, which is a sign of a disorder of cells in the case of a hand, or may be a sign of disorders of the nerve fibers as in the case of his legs.

Q. When did you next see the patient, Doctor?

A. I saw him next on April 30th.

Q. And what were his complaints at that time?

A. Well, he said that he walked well, that he felt able, [79] that he did not fear when he was walking. He had a good deal of pain in his neck and shoulders still. He had some difficulty with the control of his urine. He did not have any pain in his thumb. These fasciculations, the little muscle twitchings that had been seen before, were much less. He stood properly, without swaying and his gait appeared to be quite satisfactory if he walked slowly.

Q. State whether or not, Doctor, the improvement noted by the patient substantiated your diagnosis of herniated intervertebral disc?

A. It substantiated my diagnosis of compression of the spinal cord and disordered function of the spinal cord due to the herniated vertebral disc.

Q. Did you, Doctor, at that time, have Mr. McQueen checked for anemia?

A. Yes, I did. He had had some complications following his surgery. He had become moderately

(Testimony of Dr. Nathan Crosby Norcross.)

anemic, but he was going downhill after the operation and I felt that we should investigate that to see if something were going on that required specific therapy.

Q. State whether or not you placed him under the care of a specialist, Dr. Chew, for that condition? A. I did.

Q. Do you have an opinion, Doctor, as to what the cause of the anemia is here? [80]

A. I think, from all of our studies and what has been done, we have to feel that Mr. McQueen is one of those people that just can develop some degree of anemia fairly readily under the case of stress or something of that sort, and many times when a person starts anemia mildly they may continue to go downhill unless treatment is instituted. There was no evidence that this anemia of his was one of the serious and vicious varieties in terms of anemia that many people suffer from from time to time.

Q. Now, Doctor, do you have an opinion as to whether Mr. McQueen is disabled for his job as a railroad man?

A. Yes, I think he is disabled for his job as a railroad man. At the present time his greatest disability is pain and discomfort in his neck. The neck can be extremely painful and disabling.

The condition of his lower extremities has improved to the point where I think he can walk around ordinarily without much difficulty.

He finds, though, and this is consistent with our findings and his course, that if he tried to start

(Testimony of Dr. Nathan Crosby Norcross.)

jumping around or hopping or had to do anything that he might have to do in an active life on the railroad he would have difficulty with his leg still.

I would question that at his age this is probably ever going to improve to the point where he will be able to get on [81] and off trains and do the things that he would have to do as a conductor on the railroad. He would be much better and be able to get around well with his leg.

The problem of a painful neck is a difficult one to decide at this time. It is extremely painful now. The movement of his head and neck aggravates this pain. The pain is due in part from the injury he sustained. He has had it ever since, in part from surgery. He had a postoperative infection following this surgery, unfortunately, and that has left a good deal of scarring in his neck. So I feel that he is going to have a good deal of discomfort in that neck for a long period of time, and that in itself is a disabling pain factor. The trouble will slowly improve but may well be over quite a long period of time. He has been out of the hospital for some time now and he hasn't gotten much better yet.

Q. State whether or not, Doctor, in your opinion, Mr. McQueen's disability was caused by this accident of May 29, 1957.

A. I think his disability resulted from that accident.

Q. And will you state, Doctor, whether there is objective evidence, having in mind the findings in

(Testimony of Dr. Nathan Crosby Norcross.)

your record, that Mr. McQueen's subjective complaints are justified and understandable?

A. Yes, I think they are. The muscles in the neck are tense, they are spastic. There is limitation of movement there. He still has a little fasciculation in the leg. Much [82] less than they were, and they are improving. The use of his legs is much better, but when he tries to do something rapidly with his legs he doesn't do it very well. He is a little clumsy, put it that way.

Q. With respect to the surgery, Doctor, was it possible to repair the condition with respect to the spinal cord?

A. Well, we removed the compression of the cord, thereby hoping to arrest any further damage. Now, nerve fibers or cells that have been damaged by pressure or anything else can stand a certain amount of it and then they die. There are many, literally millions of fibers in the spinal cord. I think without any question some of the fibers have been killed.

Fibers within the brain or within the spinal cord never grow out again because they are dead, and we are left here with a definite deficiency in certain types of fibers in his spinal cord, I think probably those having to do with the agile use of his legs, the matter of rapidity or difficult use, and I feel he is going to continue to improve even from what he is now, but some of these fibers have been killed and will not regenerate, they cannot, and I question very much if he will ever be able to be as agile on his legs

(Testimony of Dr. Nathan Crosby Norcross.)

as he was, or indeed to be sufficiently so to carry out his occupation.

Q. You mentioned, Doctor, the matter of the operation and their being a question of their following pain in the neck. Will you please tell us more about that, Doctor? [83]

A. Following surgery, he developed a superficial infection of his wound. It did not go in deeply, but it was rather resistant to treatment and healed slowly. We had to open it once and then reclose it. This created a lot of scarring in the tissue underneath the skin on the back of the neck, and scarring on the back of the neck is likely to bring about rather a miserable, long-lasting, chronic, painful neck that is not pleasant at all.

Q. Is Mr. McQueen still taking pain medicine, Doctor?

A. Yes, he is. I still prescribe pain medicine for him.

Q. And is that justified, Doctor, in your opinion? A. I believe so.

Q. When you last saw him, Doctor, what was the date that you last saw him?

A. 29th of May, 1959.

Q. And what were his complaints or his condition at that time?

A. Primarily his neck and shoulders, pain, stiffness, inability to look up or turn his head.

The use of his legs, again, had continued to improve in walking only, but if he attempted to step

(Testimony of Dr. Nathan Crosby Norcross.)

up a step or turn quickly he still had some difficulty, and this will improve only very slowly.

Q. State whether or not those complaints are justified in your opinion, Doctor? [84]

A. I believe they are.

Mr. Hepperle: You may cross examine.

Cross Examination

Q. (By Mr. Martin): Doctor, you read what was stated to be the diagnosis of the General Hospital of Mr. McQueen's condition, but you weren't read the full diagnosis. Let me read it all to you, starting at the beginning:

"The first diagnosis that I see is, probable posterior column disease, spinal cord. Etiology unknown."

Now, what is the posterior column disease?

A. Posterior column disease is one that affects the fibers of the posterior column and gives people disorders of equilibrium and balance, primarily.

Q. Such as he showed? A. Yes.

Q. And it says, "Etiology unknown." What does that mean, Doctor?

A. They didn't know the cause of it.

Q. And then later on, I mean the second diagnosis, what was read to you was "CNS lues," and then in brackets the words "not reported," close brackets. Would that indicate that it wasn't considered of sufficient importance to make a report of it to somebody? [85]

A. Well, it was probably considered it wasn't

(Testimony of Dr. Nathan Crosby Norcross.)

sufficiently sure it was right to report it, because you must be very sure before it is safe to report it to the State.

Q. Yes. In other words, it was just a tentative thing that nobody had made a positive diagnosis of?

A. I believe so.

Q. Yes. And the first primary diagnosis of "Probable posterior column disease," is that the general type of thing that this compression would produce? A. Yes, that is right.

Q. And is the compression that you have discussed a type of posterior column disease?

A. No. The compression will involve the entire cord. It may involve the posterior column in some degree. In this particular instance, actually on the neurological examination there was rather more evidence of the involvement of the anterior portion of the cord than of the posterior column.

Q. I see. But at any rate is it fair to state the symptoms he showed could be, if one were making a diagnosis related to the posterior column disease, were they not?

A. Well, it could be related to spinal cord degeneration. I think that is also a term used in that record elsewhere.

Q. Oh, well, I am just looking at the face of it, [86] Doctor.

I note, Doctor, that on your first examination, which was made on December 30, 1957, you felt that Mr. McQueen first of all had a decided cervical neuralgia. What does cervical neuralgia mean?

(Testimony of Dr. Nathan Crosby Norcross.)

A. Pain in the neck.

Q. And that you based upon the complaints of pain and the spasm and the rigidity which you observed in X-rays and on clinical examination, is that correct? A. That is correct.

Q. That would go with a strain of the neck, would it not, Doctor? A. Yes.

Q. And you state that that type of head and neck pain following trauma such as he described was one fraught with uncertainty as to the speed of convalescence and the improvement. "Most of these patients get well eventually and are relieved of essentially all trouble. Once in a while one continues for an indefinite period of time without significant relief."

In that respect you were speaking primarily of what the layman might call a whiplash injury; is that right, Doctor? A. That is right.

Q. Then you went on to say, "A troublesome problem in this particular instance is the presence of fasciculations in both calves." [87]

That is the little twitching you have told us about? A. Yes.

Q. "These indicate that there may be some degenerative disorder of the nervous system not heretofore recognized."

Now, the "degenerative disorder of the nervous system," that could be the spinal cord or the brain, is that right?

A. That is right. It is a very broad term.

Q. And that was the same type of a broad diag-

(Testimony of Dr. Nathan Crosby Norcross.)

nosis as we found in the hospital record that I just read, is that correct? A. That is correct.

Q. In other words, at the time you first saw Mr. McQueen you did not feel that the picture was a clear-cut one of pressure of the cord caused by a disc? A. No, I did not.

Q. And it was only over a year later when you saw him in the early part of this year and carried out your myelography procedure that you were able to come up with a diagnosis preoperatively which tended to pinpoint it as pressure on a disc, is that correct? A. Yes, that is correct.

Q. Now, in your first examination of Mr. McQueen did you receive a history of previous headaches and neck difficulty?

A. No. He had a minor head injury in 1949, apparently, that didn't bother him too much. That is the only note I have. [88]

Oh, he said he had some sinus trouble from time to time.

Q. I see. It is true, is it not, Doctor, that arthritis, degenerative arthritis of the neck, can be a cause of headache and that type of thing, can it not?

A. At times it can, yes.

Q. And the typical type of headaches is what is described frequently as an occipital headache, is that right? A. That is right.

Q. That radiates up from the base of the neck up into the back of the head.

A. That is right.

Q. And were you aware that in 1950 he was

(Testimony of Dr. Nathan Crosby Norcross.)

given a course of neck traction for headache and neck pain?

A. 1950? Was that when he was hit on the head with a rock while on duty and was hospitalized and had some post-concussional headaches at that time?

Q. That was alleged to have occurred in June of '49, Doctor. I am now speaking about the early part of 1950. A. Not that I know of.

Q. Would cervical traction—that is, that is immobilizing the neck, is it not?

A. Stretching the neck.

Q. Stretching the neck? Would that be consistent with the treatment for an arthritis of the neck?

A. Yes. [89]

Q. And one other thing, Doctor: It is true, is it not, that this operation which you have described and the findings which you made are consistent and is done on occasion on persons with degenerative arthritis of the neck without a history of injury?

A. That is correct.

Q. And I believe you have told us that in your examination and your findings connected with Mr. McQueen, he had a rather marked arthritis in the neck, is that true? A. Yes, sir.

Q. How can this protrusion which causes this compression which your operation, I understand, was designed to eliminate, how can this protrusion come about without injury?

A. Well, the protrusion of a herniated disc is a result of a long, slow process of degeneration of the disc, I believe. I do not feel that these discs are

(Testimony of Dr. Nathan Crosby Norcross.)

actually damaged originally by trauma. I think it's a degenerative process that many people have. Some don't have any difficulty from it and others do. I believe it will eventually go on at times to a sufficient degeneration so that there is a herniation without anything else happening except the ordinary wear and tear of human life, and other times by a blow the thing can be aggravated and speeded up and made worse.

Q. I see. In other words, I understand, Doctor, that people can have a predisposition to this type of thing, is that right [90]

A. I think that is quite true, yes.

Q. And is it reasonable to conclude here, Doctor, that perhaps Mr. McQueen might have had difficulty with that neck independent of an accident?

A. Yes, he might have.

Q. As I understand it, Doctor, you feel that the complaint of neck pain at the present time is related to the post-operative effects; is that correct?

A. Well, I can't quite distinguish which is pre-op and which is post-op. He had this complaint all the way through, and certainly the operation made it worse temporarily. He then unfortunately had this infection, he has a lot of scar in there, and I think it is equally as bad now as it was before, due to our operative procedure and the infection. How much may be residual to what he had before, I don't know.

Q. Do you note any improvement in that regard?

(Testimony of Dr. Nathan Crosby Norcross.)

A. Not very much. A little bit. He is a little looser than he was.

Q. Well, after all, it's only a little more than 60 days following the operation.

A. Yes, that's right.

Q. And he is still in the stage of convalescence from that operation, is he not, Doctor?

A. That is correct.

Q. I think that you have noted a marked improvement in the [91] matter of balance and gait and that type of thing? A. Yes.

Q. And that is still showing improvement, is that correct? A. That is correct.

Q. I notice, Doctor, that in your examinations—I have copies of the reports which you gave Mr. Hepperle—in the two examinations which I have reports of, one before the operation and one after, you found no muscle weakness on your examinations, is that true?

A. Not that was demonstrable, no.

Q. Yes. And I take it he has no muscle weakness at the present time, is that right?

A. Not that is measureable or demonstrable.

Q. And the complaints referable to the right arm even before your operation were only of occasional difficulty or pain, is that true? A. Yes.

Q. And since the operation, has that complaint been eliminated?

A. It is very much better. I don't think he has any particular complaints about the arm. He still

(Testimony of Dr. Nathan Crosby Norcross.)

has a little muscle fasciculation that I can see, but he doesn't complain much about it.

Q. Yes. Well, it is fair to say, is it not, Doctor, that based upon what has gone before, and up to the present time, [92] and bearing in mind that Mr. McQueen is still in the convalescent stage, that he will continue to show improvement?

A. Yes, I am sure he will.

Q. Incidentally, Doctor, do your notes of your treatment of Mr. McQueen contain anything other than what is reported in these reports which you rendered to the attorney?

A. No. There is a good deal of laboratory work which we did that I haven't reported all verbatim. We have discussed it in relation to the anemia. The spinal fluid studies that I had done were essentially within normal limits except for a very moderate increase in protein, suggesting some irritation within the spinal cord. There are an additional two operative notes of the reopening and closure of the infected wound. I think that is about all.

Q. Doctor, with reference to this condition of anemia—which is now under treatment, as I understand it? A. Yes.

Q. Would that, together with the fact that Mr. McQueen is in a convalescent stage following an operation, would that, in your opinion, account for the feeling of easy fatigability of which he complains?

A. Yes, I think that might contribute to it.

(Testimony of Dr. Nathan Crosby Norcross.)

Q. And do you have any record, Doctor, of whether he has been gaining weight lately or not?

A. I don't have one right here, but after having lost [93] quite a little following the surgery, I understand he has gained a little recently.

Q. Yes. And I believe it is your opinion that the anemia is under control. A. I believe so.

Mr. Martin: May I have one moment, your Honor?

Q. One other matter, Doctor: Can this cervical arthritis, this arthritis in the neck, cause a limitation of motion in the neck? A. Yes, it can.

Q. That is, without injury, is that correct?

A. That is correct.

Q. Incidentally, the area between the 5th and the 6th cervical, as I understand, where you did your operation, and the next vertebrae beneath that, the 6th and 7th, is the area of greatest stress in the neck in motion, is it not, Doctor?

A. We feel that probably the level of the 4th and 5th and 5th and 6th is where the greatest stress may come, because that is where we find the greatest evidence of injury.

Q. And also the greatest of arthritis, is that right, Doctor?

A. Well, the two don't necessarily go hand-in-hand. It is most likely to be found there, though.

Q. Because of normal wear and tear? [94]

A. I think so.

Mr. Martin: Thank you; that is all I have.

Mr. Hepperle: That is all.

The Court: That is all, Doctor.

(Witness excused.)

Mr. Hepperle: Would it be convenient to take the recess at this time, your Honor?

The Court: Counsel didn't complete his cross examination of the plaintiff. Do you want to do that after recess?

Mr. Hepperle: Yes, your Honor.

The Court: We will take a brief morning recess at this time, members of the jury.

(Short recess.)

The Clerk: Let the record show Harry J. McQueen, the plaintiff, has resumed the witness stand.

HARRY J. McQUEEN

the plaintiff herein, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination—(Resumed)

Q. (By Mr. Martin): Mr. McQueen, at the time that we finished yesterday, I was about to show you some photographs, which I have shown to your lawyer, and I will show you these pictures and ask you if they show generally the layout of the interior of a caboose [95] such as the one you were in at the time of the happening of this accident. You understand, I don't purport that these are the exact caboose; I am just showing them to you as an example of the general way in which the caboose was laid out and the seating arrangement and so forth.

(Testimony of Harry J. McQueen.)

Mr. Martin: May I approach the witness, your Honor?

A. In a general way, yes, except that these rules are liable to be over here or there or liable to be in the cupola.

Q. Yes. And does that go for this picture, too, Mr. McQueen?

A. Yes, same thing. Only the rules are liable to be someplace else.

Q. All right. And for the purposes of the record, the desk that we are looking at in these pictures is the conductor's desk, is that right?

A. That's correct.

Q. And the grab irons you referred to are these two stanchions that come out on each side of the desk, is that right? A. That's right.

Q. And there is a window right over the desk which permits you to see out and see what's going on outside if you want to, is that true?

A. That's right. [96]

Mr. Martin: So we will offer these at this time for purposes of illustration only, your Honor.

The Court: All right. A and E?

The Clerk: Defendant's Exhibits A and B introduced and filed into evidence.

(Photograph of caboose marked Defendant's Exhibit A into evidence.)

(Photograph of caboose marked Defendant's Exhibit B into evidence.)

Mr. Martin: I wonder if we might at this time pass these to the jury, your Honor.

(Testimony of Harry J. McQueen.)

(Exhibits A and B handed to the jury.)

The Court: I think you might just go ahead. They are only looking at photographs, so I don't think it makes much difference.

Mr. Martin: Very well.

Q. Mr. McQueen, do I understand that at the time of the occurrence of this accident, you were not holding onto the grab irons, is that correct?

A. Would you say that again?

Q. I say at the time that this accident happened, you weren't holding onto the grab irons, is that right? A. No.

Q. However, those grab irons are there for the purpose of guarding against rough action and slack action in the caboose, is that right? [97]

A. To protect yourself, yes.

Q. Yes, and incidentally, Mr. McQueen, I believe you testified you came to work for the Southern Pacific Co. in 1943 during the war, is that right?

A. Yes.

Q. And did you sign on with the Southern Pacific Co. as a brakeman? A. As brakeman.

Q. And had you had experience in railroading before 1943, Mr. McQueen? A. Yes.

Q. How far back did that experience date?

A. Well, around 1916.

Q. And had that always been here in the West or had it been in various other roads?

A. No, it had been several places.

Q. I see. Could you tell us a few of the railroad companies for whom you worked in the past?

(Testimony of Harry J. McQueen.)

A. Well, B & O, Pennsylvania, and Northwestern. And several times for both those railroads, and also worked for I. E. DuPont—that was railroad. That was all railroad. And steel mills, which is railroad—all private concerns.

Q. And had your experience in railroading all been as a brakeman or conductor?

A. Yes. [98]

Q. Have you any estimate of the total time that you have put in, in railroading, Mr. McQueen?

A. Well, if I had it all allowed to me, it would be maybe around 30 years, 29 years.

Q. I see. And incidentally, on some of those railroads, as I understand it, you didn't use the name McQueen, is that right?

A. That's right.

Q. You used a couple of other names, is that true? A. That's right.

Q. And as I recall it, Mr. McQueen, it is your estimate that there were about 92 cars on this particular train coming into West Oakland?

A. Yes.

Q. And about where was it when you come into West Oakland, where you come into what is known as the yard limits?

A. Would you ask that again, please?

Q. I say, could you tell us generally speaking when you are coming into West Oakland, about where is it that you come into the so-called yard limits?

A. Come into the yard limits at Richmond.

(Testimony of Harry J. McQueen.)

Q. I see. A. 12 miles.

Q. And yard limits simply means an area designated by the roalroad where there are many spur tracks and industries [99] along the right of way, is that right?

A. Yes. Used for making up trains and so forth.

Q. They are switching in and out and making up trains and breaking up trains, and that type of thing, is that true? A. That's right.

Q. And you have to operate at reduced speeds in yard limits, is that correct?

A. Required speed, yes.

Q. And in yard limits particularly, there are a great number of these block signals and automatic signals, like the one that was involved in your accident, is that true, sir? A. Yes.

Q. At the time of the occurrence of this accident, Mr. McQueen, where were you living?

A. Where what?

Q. Where was your residence? Where was your permanent place where you were staying?

A. Well, 1835 7th Street on this end.

Q. In Oakland? A. Yes.

Q. I see. Did you have another residence on the other end?

A. Yes, I had a residence, a house, and then I moved into a hotel and I had several residences up there.

Q. Where would that be, in Roseville? [100]

A. Roseville, yes.

Q. In other words——

(Testimony of Harry J. McQueen.)

A. And out at Citrus Heights, and different places close to the railroad work.

Q. I see. In other words, your work occasionally brought you to Roseville, where you stayed, and then occasionally you would stay in Oakland, the other end of the line, is that right?

A. That's right.

Q. And Mr. McQueen, in your work with Southern Pacific as I understand it, you were qualified not only as a brakeman but as a conductor, is that correct? A. Yes.

Q. A conductor is the man in charge, or the foreman, so to speak, of the train operations, is that true? A. That's right.

Q. And generally speaking, was your work, say for the past year or two before this accident, be mostly as conductor or mostly as brakeman?

A. Well, mostly as conductor.

Q. And how was it determined whether you work as conductor or brakeman? A. How's that?

Q. I say, how would it come about that you would work as conductor sometimes? [101]

A. Well, seniority; pulled off a job. This is a miles job. It is—we have so many miles to run on this division here and then we have so many crews, and when you get the miles made up, why, you pull a certain amount of crews off. Sometimes you—now, at present they have got, I think I heard some of the boys say—this is just hearsay—three crews. But they have had more than five crews.

Q. In other words, if you are working a lot

(Testimony of Harry J. McQueen.)

of men or many crews, you would work as a conductor, is that right? A. That's right.

Q. But when a number of crews are reduced, because of your seniority, you would be required to work as a brakeman? A. Yes, down here.

Q. But most of your work, if I understand you correctly, prior to the time of the happening of this accident, was as a conductor?

A. It's been more as a conductor on this Oakland job than it has been as a brakeman.

Q. Now, how does the work of conductor differ from the work of brakeman?

A. Well, it differs that the conductor has complete charge of the train, supervises the work of it.

Q. As conductor, is most of your work done in and around the caboose? A. Most of it. [102]

Q. And the men report to you, is that right?

A. Yes, they report for work to you.

Q. And you see that they make the proper inspections and make the proper moves when stops are made, and that type of thing, is that correct?

A. Yes. You see to that.

Q. It is true, is it not, that the work of a brakeman is more physically demanding than the work of a conductor? Is that correct?

A. Well, yes, I would say he has got more walking, things like that to do.

Q. The conductor has a lot more paper work, doesn't he?

A. Yes, he has all the paper work, most all.

Q. Yes. And incidentally, as either a brakeman

(Testimony of Harry J. McQueen.)

or conductor, because of the fact the railroad operates almost every day of the year, you are required to be on the road at various hours and under various weather conditions, is that true?

A. I am required to be on the road at various hours, yes.

Q. And regardless of weather, isn't that right?

A. Yes, that's right.

Q. Whether rain or snow or whatever, is that correct?

A. Regardless of the time of day or rain, weather or anything, subject to call 24 hours.

Q. And as a brakeman, do you have to do much climbing about cars? [103]

A. That's according to what job you are on. Some, yes.

Q. Depends on the type of job you get, is that right? A. That's right.

Q. And of course, the more seniority you have, the more control you have over the type of job you get, is that right? A. Yes.

The Court: Mr. Martin, with reference to these two photographs, I understood you to say that they were photographs of different cabooses.

Mr. Martin: No.

The Court: I think you are mistaken. I think they are photographs of the same caboose, but taken from a different angle.

Mr. Martin: That's correct, Judge. What I meant to say is they don't purport to be the caboose in-

(Testimony of Harry J. McQueen.)

volved in this occurrence we are dealing with here.

The Court: Yes.

Mr. Martin: They are just a prototype. May I see those one moment?

The Court: I did a little detective work. That is how I decided that. The calendar seems to be in the same position.

Mr. Martin: I didn't express myself very well, I guess, your Honor. Incidentally, Judge, there is some handwriting on the back of this one, just a line or two, which has [104] no significance in connection with this case. I wonder if it would be all right if I just scratched over it?

The Court: Surely.

Mr. Martin: Thank you, Judge.

Q. Mr. McQueen, did you have some trouble with your neck and headache back in 1950?

A. Neck and head?

Q. Yes, sir.

A. Had flu and headaches.

Q. Were you in the general hospital about that time with complaints with relation to your neck and your head?

A. No. I went in there for the flu.

Q. Did they put you in neck traction at that time?

A. Yes, tried to relieve headaches.

Q. And were those headaches, headaches in the back of your head coming up from your neck?

A. No.

(Testimony of Harry J. McQueen.)

Q. Incidentally, Mr. McQueen, have you recently put on a little weight? A. Recently?

Q. Yes.

A. I'm still underweight from what I went in the hospital.

Q. But you have been gaining a little?

The Court: He wants to you know, in the last few weeks have you gained any weight? [105]

The Witness: Four pounds.

Q. (By Mr. Martin): Is it not true, Mr. McQueen, that as a railroad man at age 65 you are entitled to retire with your maximum pension?

Mr. Hepperle: One moment.

The Court: Well, can you agree on that?

Mr. Martin: I did not think there was any disagreement about it, your Honor.

Mr. Hepperle: I think it is a subject that can perhaps be covered by your Honor's instruction. But the subject of pension we would like to have your Honor instruct the jury is immaterial in this case and is not to be considered in relation to the damages to be awarded to Mr. McQueen in any sense whatsoever.

The Court: Well, this is really a legal matter that you are bringing up, isn't it, Mr. Martin? You are asking his opinion whether or not he is eligible or not for a pension.

Mr. Martin: I think, your Honor — I should think any railroad man would know that, Judge.

The Court: Well, they may, but you know the evils of a little knowledge. If this is some matter

(Testimony of Harry J. McQueen.)

that is not questionable and it is a fact, why, just state it.

Mr. Martin: Well, will you agree that that is the fact, Mr. Hepperle?

Mr. Hepperle: I think it is, your Honor, and I [106] would also like to have your Honor instruct the jury at the time of instructions as I previously indicated.

The Court: All right.

Mr. Martin: All right. Then we have agreed that age 65 is the age at which railroad men may retire on age at maximum pension.

Q And, Mr. McQueen, have you applied for your pension? A. No.

Mr. Martin: Thank you. That is all I have.

The Court: Any redirect?

Redirect Examination

Q. (By Mr. Hepperle): Did you intend to continue working beyond age 65 before this accident, Mr. McQueen?

A. Yes, I made no plans to retire providing I remained in good health.

Mr. Hepperle: That is all.

The Court: That's all. You can step down.

(Witness excused.)

Mr. Hepperle: I have a few brief matters, your Honor. I have the bill of Dr. Chew to add, perhaps it should be added to the other medical bills with a sub-number to show it is an addition.

Mr. Martin: May I see that, counsel?

Mr. Hepperle: Oh, excuse me. [107]

Mr. Martin: Thank you.

The Court: Any objection to that?

Mr. Martin: No objection.

The Court: All right, add it to the other exhibit.

The Clerk: That will be added to the envelope of bills and given the number 3-A.

Mr. Hepperle: We will ask that your Honor take judicial notice of the 1937 Standard Annuity Table, giving the life expectancy of a male aged 63 as 15.62 years, and of a male aged 65 as 14.40 years.

The Court: Very well.

Mr. Hepperle: And the illustration which is now on the board, your Honor, may we offer as plaintiff's next in order?

The Court: That will be Exhibit 4, I believe, isn't it?

The Clerk: Plaintiff's Exhibit 4 introduced and filed into evidence.

(Bill of Dr. Chew received in evidence as Plaintiff's Exhibit 3-A.)

[See page 185.]

(Illustration on blackboard received in evidence as Plaintiff's Exhibit 4.)

Mr. Hepperle: And may it be stated formally for the record that Southern Pacific now admits that a student towerman in the tower negligently flipped the switch which [108] threw the red light or changed the green signal to red immediately in front of the train involved in this case?

Mr. Martin: Yes, sir.

Mr. Hepperle: I have some rules, your Honor. May I show them to counsel?

Counsel would like to confer with your Honor about these rules that we would like to offer. I think that unless I have overlooked something, your Honor, that plaintiff will rest, and perhaps it might be convenient to take the noon recess at this time and perhaps start earlier if that meets with your Honor's convenience.

The Court: Well, except for these rules, you are finished, then?

Mr. Hepperle: That's right, your Honor.

The Court: You don't know just what your plans are, then, I take it?

Mr. Martin: Not specifically, but I will have a witness or witnesses this afternoon, your Honor, but I except it to be quite brief.

The Court: Well, I have a criminal motion that I have to hear, anyhow, and people are waiting for that, so I think we will take the recess now, then.

Come back at 2:00 o'clock, members of the jury. It looks as if we will probably finish this afternoon. Please return at 2:00 o'clock.

(Recess to 2:00 o'clock p.m. this date.) [109]

Afternoon Session: 2:00 P.M.

The Court: Has the plaintiff rested?

Mr. Hepperle: There are a couple of brief matters, your Honor, but I understand counsel has his doctor here and I have no objection to his going ahead with him in order to accommodate the doctor.

The Court: Do you want to do that?

Mr. Martin: Yes, but I would like to make a very brief opening statement first.

The Court: Then why don't you dispose of your matters first, then, if there is going to be an opening statement?

Mr. Hepperle: We have some papers here, your Honor, showing pay increases between the time of the accident and the present time.

Mr. Martin: Your Honor, I have utterly no knowledge of this subject. This is the first time it has been brought to my attention. I don't know where the information came from or whether it is accurate according to some records or what the situation is.

Mr. Hepperle: It came from the Conductors Brotherhood, your Honor. Perhaps it could be admitted subject to counsel having an opportunity to check it.

Mr. Martin: As I understand it, we may be arguing [110] this case this afternoon, your Honor. I don't know what opportunity I would have to check it during the day today.

The Court: Well, that is up to the plaintiff. Counsel doesn't stipulate to it, you will have to prove it, if you consider it is important.

Mr. Hepperle: I do, your Honor, and I can telephone a man and have him here within just a few minutes.

The Court: All right. Is there anything else that you have got?

Mr. Hepperle: Yes, I have four rules to offer, your Honor, and I also have a motion to make

which perhaps should be done in the absence of the jury.

The Court: Well, what sort of a motion is it?

Mr. Hepperle: A motion to strike, your Honor. It is a motion to strike all evidence of defendant's Safety Rule No. 2061 on the ground that it is incompetent, irrelevant and immaterial, that it contravenes 45 U.S.C.A. Section 55, in that it attempts to exempt the defendant, Southern Pacific, from the liability created by the Federal Employers Liability Act, 45 U.S.C.A. Section 51.

Further, that it contravenes 45 U.S.C.A. Section 54, in that it injects into this case the doctrine of Assumption of Risk, which is abolished by the statutes, and is a device designed to enable defendant to escape or lessen its liability for its admitted breach of duty to plaintiff. [111]

And we have five decisions, your Honor, which we cite in support of the motion.

The Court: What evidence is there on that? I don't recall any evidence concerning that. Counsel in cross examining the plaintiff asked him if he were familiar with such a rule.

Mr. Hepperle: That's correct, your Honor, and the rule is also framed on the wall of these two pictures, Defendant's Exhibits A and B.

The Court: Well, you can't read it, can you?

Mr. Martin: I can't read it, I'll tell you that.

Mr. Hepperle: I can, your Honor.

The Court: You can? Let's see them.

Mr. Martin: I intend to offer the rule, your Honor.

The Court: Well, then, if you are going to offer the rule, why don't you wait until he offers the rule and then you can make your objection? I don't know what I would strike.

Mr. Hepperle: We move to strike all reference to the rule, your Honor, that is brought up by counsel in his cross examination of plaintiff, and also that it be stricken from the two photographs, and we have five citations——

The Court: I don't see any merit to that motion at all, Mr. Hepperle. If counsel is going to offer this rule, you can object to it and raise the point properly then. I can't strike it from the photographs. [112]

First of all, you would have to use a magnifying glass or I don't think you can read that. Secondly, it is supposed to be a picture of the room, and it was offered for illustrative purposes, and it was agreed that it was not a picture of the caboose involved in this accident.

I just don't think that the point you are trying to make is reachable under the form of motion you make now, but if counsel offers the rule you may object and I will rule on it.

Mr. Hepperle: Very well, your Honor.

The Court: Now, what else do you have?

Mr. Hepperle: We have four rules to offer from the Southern Pacific Company's rules and regulations of the Transportation Department.

The first one is Rule No. 28, headed, "Service Stock."

Mr. Martin: Before he reads the rules, your

Honor, I would appreciate it if they were shown to you because I have an objection with reference to these rules.

The Court: What is the number of the rule?

Mr. Hepperle: I have them marked on a paper here, your Honor. (Handing document to the Court.) The last one is found earlier in the book.

The Court: Well, I consider that Rule 28 is completely inapplicable. You have already got a [113] stipulation that the red signal was negligently given, causing an emergency stop. I don't see that this would do any more than complicate the matter, Mr. Hepperle. You would have to have someone take the witness stand and explain what these technical terms are that are referred to in the rule. So far as I can see, it would be meaningless and would complicate the case, and it certainly wouldn't do your case any good.

The next one is No. 60?

Mr. Hepperle, without counsel making an objection, I just don't see the applicability of the rule to your case here. It seems to me to relate to matters you are not concerned with here.

Mr. Hepperle: Our point is this, your Honor: that under the rules the engineer is charged with properly handling the train. In this instance the admitted negligence of the tower operator caused this sudden, violent stop. But plaintiff seeks to charge—rather, defendant seeks to charge plaintiff with contributory negligence, and it was my feeling that these rules were pertinent to show that the

sole cause of the accident here was the negligence of the tower man changing the signal.

The Court: Well, you have testimony that the engineer applied the emergency stop and stopped the train immediately.

Mr. Hepperle: Yes, sir. [114]

The Court: I don't see what you think you can do there. Assuming you have objected, I will sustain the objection.

Mr. Hepperle: Well, in relation to the pay information, your Honor, I can telephone the man and he can be here shortly. I don't know whether I should do it now or how long counsel intends to take, or whether it should be done during the recess.

The Court: Well, I don't wish to be harsh about this thing, but a lawyer should be ready with his case. At the very last minute you come in with something you haven't shown the attorney on the other side, and he is not in a position to stipulate to it because he doesn't know whether the figures on there are accurate or correct or not, and then you want to stop proceedings now to bring someone here to testify to these matters. It slows up the process of the case.

What difference does it make, anyhow? It isn't of any great consequence.

Mr. Hepperle: I will withdraw the offer, your Honor.

The Court: Now, the plaintiff has rested?

Mr. Hepperle: Plaintiff rests.

Mr. Martin: Your Honor, counsel, and members of the jury:

I am going to make a very brief opening statement in [115] this case, since the evidence has not taken long and will not take long to conclude, and therefore I don't believe an extended opening statement will really help much in this matter because we will be arguing it before very long.

I believe the evidence will show and has shown that as the train on which Mr. McQueen was riding in a caboose was coming into the Oakland yards a student tower man inadvertently or negligently, however you want to state it, without direction from his senior tower man, threw a switch which caused a red block signal to go on in the path of the locomotive, which immediately, of course, caused the engineer to stop the train, as he is required to do under the rules, in the shortest possible time.

The speed of the train was six to seven miles per hour, which caused what is commonly referred to as a "rough stop" in the caboose.

Mr. McQueen was shaken up in the caboose by consequence of the rough stop which was made.

The evidence will show, I believe, that there are certain rules which apply to people riding as Mr. McQueen was and their conduct in the caboose, which may be considered by you in connection with the question of contributory negligence in this case, which has not been waived by the defendant. What we have done is admit that the throwing of the switch which caused the signal to go red was [116] negligence, but the question of Mr. McQueen's conduct and whether that constituted contributory negligence is before you under the evidence in the case.

Now, his Honor at the conclusion of this case will instruct you fully on the law as to the effect of contributory negligence on the part of plaintiff.

The Court: Mr. Martin, I don't think you really should make that assumption as yet in this case.

Mr. Martin: Well, all right, your Honor. I realize there is a question of law involved, your Honor.

I will say this, that the defense has set up the question of contributory negligence, and if that is acceptable to the Court under the law, you will be instructed on that subject and its effect. I will not dwell upon it here. It's a matter for the Court.

The second aspect of this case has to do with the nature and extent of the injuries which were sustained by Mr. McQueen.

The hospital records have been partially referred to here and may be referred to by a Dr. Van Horn, whom I am calling in a very few minutes.

I think the essence of the matter is that Mr. McQueen had a condition known as cervical arthritis, or arthritis of the neck, which was amply demonstrated by the x-rays which were taken before and after the occurrence of [117] the accident which is the subject of this lawsuit.

Rather than go into a detail explanation of the medical testimony in that regard, we have already heard what Dr. Norcross had to say. We will in a very few minutes put on Dr. Van Horn, also a neurosurgeon, who will explain to you his findings and what the cervical arthritis and the condition of the neck of Mr. McQueen is as he saw it. Upon the conclusion of this case we are going to ask you

to return a verdict which is in accordance with the law and which is fair to both sides.

Thank you.

Dr. Van Horn.

DR. PHILIP R. VAN HORN

called as a witness on behalf of the defendant; sworn.

The Clerk: Please state your name to the Court and to the jury.

The Witness: Philip R. Van Horn.

The Clerk: Is that "Philip" with one "l" or two "l's"?

The Witness: One "l."

Direct Examination

Q. (By Mr. Martin): Your name is Philip Van Horn? A. Yes, sir.

Q. You are a physician and surgeon licensed to practice your profession in this state, are you, Doctor? [118] A. I am.

Q. Where do you maintain your offices?

A. 411 - 30th Street, Oakland.

Q. And do you follow a specialty in the practice of medicine, Doctor?

A. Yes. Neurosurgery.

Q. Briefly, what is neurosurgery?

A. The diagnosis and surgical treatment of disorders and abnormal conditions of the brain, spinal cord and peripheral nerves.

(Testimony of Dr. Philip R. Van Horn.)

Q. Will you tell us, Doctor, as briefly as possible, what your medical background is.

A. Four years of premedical college work and a degree of Bachelor of Science from the University of Washington. Four years at Stanford Medical School, with an M.D. degree. A year's intern at Alameda County Hospital. Another year as assistant resident in surgical specialties in the same hospital.

Another year at Cowell Memorial Hospital, University of California campus. And about four years of general practice, during which I became more interested in the problem of the nervous system.

I then returned to the University of California where I was assistant resident in neurological surgery for a year and a half. Following that, into the Army, first at the [119] Army Medical Center at Walter Reed Hospital in Washington, D. C. From there I was sent as assistant chief of neurosurgery service with several large Army neurosurgical centers, the first being the Northington General Hospital in Alabama, the Kennedy General Hospital in Memphis.

Following the war, I returned and was assistant to an established neurosurgeon in Oakland until 1950, and I have been in independent practice since that time.

Q. Are you on the staffs of various hospitals in the East Bay, Doctor?

A. Yes, I am on, I believe, most of the staffs of the East Bay hospitals.

(Testimony of Dr. Philip R. Van Horn.)

Q. And do you belong to various organizations relating to your specialty?

A. Yes. The American Medical Association with state and county branches, San Francisco Neurological Society, the American Congress of Neurological Surgeons, Pan-Pacific Surgical Association.

I am chief of the Alameda County Hospital Neurosurgical Service, consultant to the Oakland Veterans Hospital, do consulting work there; do consulting work for the Crippled Children's, for the Girls' Vocational Rehabilitation organizations. I am assistant neurosurgeon for the University of California Student Health Service on the Berkeley campus, and in addition to that, I am in private practice. [120]

Q. All right, Doctor. And, Dr. Van Horn, did you at the request of my office have occasion to examine Mr. Harry McQueen, the plaintiff in this action? A. Yes, I did.

Q. And when did you first examine him?

A. February 2nd, 1959.

Q. And I presume that as part of your examination you took a history and then did a medical examination, is that right, sir? A. Yes, sir.

Q. Without going into great detail, Doctor, can you tell us what history you received which was significant as far as the neurological examination was concerned?

A. Yes. He stated he was sixty-four and had been in good health until May 29, 1957, when the incident occurred and he was thrown against a

(Testimony of Dr. Philip R. Van Horn.)

grab iron in a caboose, striking his right arm and head and face on a wall box. He was not unconscious but was somewhat dazed. But he has full recollection of the events leading up to the accident and the injuries themselves. He did not fall to the floor. He sat and rested until the train reached the yard, at which time he walked off the train and went into the office in the brakemen's room where he sat while the conductor made out the accident report and phoned the trainmaster and phoned a doctor, apparently.

His symptoms were described and the medication was [121] phoned to a drugstore. He was driven to the drugstore where this was given to him, and then he was taken home to Oakland.

He went to bed about 6:00 o'clock, after bathing his swollen right arm. Apparently he had severe pain in his arm, hand and head at that time, without much relief, so he called an ambulance and was brought to the Southern Pacific Hospital that night.

He was sent home the same night, about 2:00 o'clock in the morning, by taxi, and no bed was available in the hospital. The ferries were not running and he had to stay over in San Francisco. He spent a restless night and went home the following day.

He remained home and rested for a few days. After about a week he returned to the hospital and was allowed there as an outpatient being given physiotherapy and other treatment, but symptoms persisted and after about five months he was ad-

(Testimony of Dr. Philip R. Van Horn.)

mitted to the Southern Pacific Hospital, where he remained for five or six weeks, and during that time had a wide variety of diagnostic treatments and tests. He had no operation. He was released and still was given pain medication.

Q. Incidentally, Doctor, have you had an opportunity to review photostatic copies of those hospital records? A. Yes, I have.

Q. All right, then, will you proceed? You had asked him what his symptoms were at the time of his examination, is that correct? [122]

A. Yes, sir.

Q. What were his complaints at that time?

A. He stated that immediately after the injury he developed a headache which was more severe at night. This involved the back of his head and neck. He had a feeling of being very unsteady on his feet since the first night of his injury, and stated that this had been present ever since and had not changed. He felt uncertain in his walking and felt as though he might fall either way.

In addition, he had ringing in the side of his head and his hearing was not as good as it used to be.

His right arm was painful and swollen at first, but the swelling had subsided, but the thumb still felt numb and he occasionally had an electric sensation running down the forearm and entire hand, especially in the thumb and fifth finger.

His vision was a little impaired at first, but this cleared with glasses. He stated that his eyes felt

(Testimony of Dr. Philip R. Van Horn.)

dull and heavy. He felt somewhat restless but not particularly nervous. He was somewhat more forgetful than usual but was able to cope with ordinary situations.

Those were the essential complaints he gave us at that time.

Q. Was there anything significant in the past history that you asked him about, Doctor? [123]

A. He stated that—there was a little variation between what he told me and the hospital records, which I think is just normal because people don't always remember just accurately what went on.

He said that he did take one month off from work in 1955 for sinus trouble. Actually, I believe the records show that in 1949 he cut his head and this was sewed up, and six months later he began to complain of headaches and was hospitalized—general recurrent headaches, and was hospitalized until April 16th, from January through April, 1950, on account of these recurrent complaints, during which time he was given physiotherapy and, I believe, neck traction, and x-rays showed a good deal of arthritis in the neck, as well as a foreign body in the back of his—in the occipital bone, which was thought to be a bullet fragment. Nobody has yet found out what it is. I am still curious. I don't think that is particularly pertinent, however.

The essential thing was this one period in 1950 when he was hospitalized for periodic headaches and arthritic changes were shown.

Q. All right, Doctor. Then following the taking

(Testimony of Dr. Philip R. Van Horn.)

of the history and the complaints of Mr. McQueen did you perform an examination upon him?

A. Yes, sir. [124]

Q. And what were the significant findings, if any, at that examination?

A. He struck me as being a somewhat older man than his chronological age. He seemed a little bit more elderly than he should.

He was rather restless and nervous and moved his arms and hands in a rather fidgety manner.

His neck showed some limitation of extremes of motion, and he was rather apprehensive about moving his neck although there was a fairly good range of movement.

His hearing was a little diminished, but not markedly declined. He had no thickening of his ear drums, which would not be inconsistent with his age.

There was a small tumor on his chest which he had had for many years, which was not important. Blood pressure was somewhat elevated, and he did show some evidence of arteriosclerosis on the examination and also in the previous reports, where there was calcification in the large blood vessels, and shown in x-rays of the abdomen, which we associate with premature aging to a certain degree.

His back had full range of movement without complaining. He complained of dizziness on getting up from lying down, which is not uncommon with people of his age with arteriosclerosis.

Examination of the extremities, there was full

(Testimony of Dr. Philip R. Van Horn.)

range [125] of movement without complaint. Vague tenderness about his right thumb, although he used it quite well.

There was no measurable weakness or atrophy. In other words, the right hand was not wasted. The right hand actually measured larger somewhat than the left, which we expect of right-handed individuals.

There were no local muscle atrophies. Circulation was essentially normal except for moderate varicosities in both legs.

Memory, he seemed rational, cooperative and alert, but rather slow in his response. He seemed to weigh his replies rather carefully. His responses were accurate, but his memory for some dates seemed to be somewhat impaired. He was tense, nervous, and fidgety, as previously noted.

An examination of the cranial nerves, examination of the function of the nerves coming from the brain are not too important, not abnormal.

Examination of his motor function — by that I mean the motion function of his extremities — showed that he walked with a rather bizarre, strange wide base with an ataxic and unsteady gait. This struck me as being rather excessively wide based, and while he was somewhat unsteady, I had a feeling that this was somewhat exaggerated.

He tended to sway on Romberg testing. In other words, putting his feet together and closing his eyes, he had a tendency to sway, which is present with latent unsteadiness.

(Testimony of Dr. Philip R. Van Horn.)

On tests for motion coordination, the tests for the legs were not too well done. Heel to shin tests were poorly done. Finger to nose test was rather bizarre and wild, not constantly abnormal, and didn't quite fit in with his behavior when he was not being tested. In other words, on closing your eyes and touching your nose he had a tendency to go way off, and when reaching over he would automatically be more accurate, which is a thing we see in people who have a tendency to accentuate or perhaps to be more impressed with their disability than they should be. [127]

He did not show true (not understandable) signs. His grip appeared to be good except for some weakness in the right hand at times. Other times this was not apparent. Examination of the sensory system, that is, his ability to appreciate feeling of various types, showed a strip of sensory disturbance, diminished sensation, extending down the right forearm under the thumb. Also the tip of the fifth finger and over and above this there was some sensory loss over the entire right arm. That was less sharp; he felt pinprick less sharp on that than he did on the other arm. This didn't conform to definite, usual, normal limits which we see with organic problems.

Reflexes were essentially present and equal throughout for his age. I think that covers essentially the neurological features.

Q. All right, Doctor. On the basis of your examination and on the basis of the information which

(Testimony of Dr. Philip R. Van Horn.)

you had available to you from the hospital records, what impression did you form with reference to Mr. McQueen's difficulty?

A. Well, I felt that here was a man who had had previous trouble with his neck, had had headaches and a period of hospitalization in the past, who had x-ray evidence of previous stiffness and limitation of neck movement, and then had sustained an injury that jolted and jarred him, which there undoubtedly was unpleasant and distressing, but was not [128] severe enough to cause damage to the brain or spinal cord. We do see this type of injury produce flareup of local nerve and neck symptoms. I felt that there was possibly some flareup here to account for his neck and arm symptoms. The leg symptoms and unsteadiness impressed me as being rather functional. By that I mean of a nervous origin, in that a person of his age, all people when they tend to get a little older are less steady, and as time goes on they tend to get more unsteady. But I had a feeling that he was exaggerating this, because he did not show the organic signs we would see with damage to the long tracts in the spinal cord. In other words, had the spinal cord been truly damaged, we would expect at least to the degree where he was—as unsteady as he was, we should expect abnormal reflexes, definite sensory changes, loss in sphincter control, things that are not—not put on is not a good word—that are testable and they are not subject to the individual's control. He did not have any of these signs

(Testimony of Dr. Philip R. Van Horn.)

which we expect to find in organic damage. So I felt that there was at least a considerable element of nervous exaggeration of any underlying unsteadiness. He may have had, from age and arteriosclerosis, perhaps unpleasant blow to his neck and some flareup of his arthritic pains.

Q. And you mentioned, Doctor, that with organic damage to the spinal cord,—Now, first of all, what do you mean by [129] "organic damage to the spinal cord"?

A. Well, actually, destruction of nerve tissue. The spinal cord transmits the orders from the brain to the rest of the body. When there is actual organic damage and destruction of tissue and nerve cells in nerve tracts.

Q. And with such condition present, you mentioned there was a loss of sensation, for one thing. What accounts for that?

A. Well, not invariably, but when it is a significant degree, if the sensory tracts are involved, then we get various types of loss of sensation, depending upon the area involved. If it is very minute, it is possibly not testable, but in the severe degree, when you have loss of ability to feel pinprick, light cotton, position sense of the extremities, laboratory sensation, it is quite normal, for instance, to lose the ability to feel a tuning fork held against the bones of the leg. This actually disappears in many people as they get older. But it is a fairly sensitive one for sensory loss in the spinal cord. And his sensation checked out quite well.

(Testimony of Dr. Philip R. Van Horn.)

Now, the sensation in the arm followed a nerve root distribution. In other words, the nerve leading off the spinal cord, numbness over his fingers tended to follow the root distribution, which was not (balance unintelligible to the reporter). [130]

Q. I see. What root did that indicate, if it indicated any specific one?

A. Probably the sixth cervical.

Q. And this pain in the arm which he described; did he describe it as a constant thing or a variable thing?

A. Constant, fairly constant. It was severe in occurrence and with this, in addition, he had the swelling in the arm. So that it was a little difficult to know how much was from the neck and how much actually from the physical bruise on the arm, where apparently it was swollen. But he describes this as a constant pain in the arm, in the right thumb.

Q. Well, I take it, then, from what you have told us, Doctor, that you did not at that time have the impression of any actual damage to the cord itself. Is that correct?

A. Not that I could test. The problem of his unsteadiness is one which we always wonder about when a patient has nerve injury. We do see it in people of his age with arteriosclerosis and cervical arthritis, who tend to develop a certain amount of unsteadiness. I felt he was certainly not, perfectly normally, putting his best foot forward. In other words, he was accentuating his loss of balance when

(Testimony of Dr. Philip R. Van Horn.)

I saw him. In my report I said I thought this could have been, he showed some functional accentuation which could have been on an arteriosclerotic basis. Well, in other words, some of the [131] circulation of the spinal cord is impaired, and that will cut off functions, simply, as well as pressure or injury. And I felt that although there was or could be some element there which was overshadowed by this exaggerated phase and not accompanied by organic findings, I felt that was painful, yes.

Q. Well, following this initial examination in February of 1959, Doctor, did you have an opportunity to examine Mr. McQueen following the operation on his neck by Dr. Norcross? A. Yes.

Q. And when was your second examination?

A. May 4th, 1959.

Q. And, incidentally, with the consent of Dr. Norcross, did you have an opportunity to examine the records at Peralta Hospital pertaining to treatment of Mr. McQueen? A. Yes, sir.

Q. While there? A. Yes.

Q. All right. On your second examination of May 4th of 1959, Doctor, what were the findings on that occasion?

A. He stated that he was improved after the operation; that the pressure was all gone from his neck and that he had no more headaches. The arms do not ache and no more numbness, although a slight aching in the right thumb at times. States the thumb no longer jumps any more and the old numb [132] streak in the right forearm is gone.

(Testimony of Dr. Philip R. Van Horn.)
Balance and leg are good and he thinks he is back to his pre-injury status. At the present time his only complaint is a tired ache in the back of his neck and his neck feels stiff if he sleeps in the wrong position. Spends most of his time sitting and resting, most of the day. He hadn't recovered to the point where he wanted to drive his car yet. Thought he was still improving. But still had occasional pain and was taking about six or eight pain pills a day. On examination he showed a healed, recent, cervical, surgical scar with diffuse tenderness around the entire back of the neck and extending up into the upper shoulder. The limited neck movement about fifty per cent, and he was unable to extend beyond the vertical plane with this limitation. And he complains of pain on all extremes of movement, with moderate tightness and spasm of the neck muscle. In other words, he held the neck pretty stiff, which would not be unusual for a man two weeks out of the hospital after a neck operation.

The neurological examination showed no weakness, he had full range of movement in his arms, although he complained of pain in his neck on overhead movement of his arms. His balance was good and he stood well on either foot. There was minimal swaying on Romberg testing, which again is difficult to assess, because many people past fifty will sway somewhat with both feet together, looking up at the ceiling [133] and with their eyes closed. They will sway. This did not impress me

(Testimony of Dr. Philip R. Van Horn.)
as being excessive, associated with a (unintelligible), especially when compared with the other balancing tests.

Arms had full range of movement. Reflexes were present and equal. Possibly a little diminution in the triceps and ankle jerks, which were within normal limits. There were no sensory abnormalities and no other particular abnormalities, although his blood pressure was 170 over 108 (balance unintelligible).

Q. And with reference to the examination of the Peralta records, Doctor, what did you obtain as to additional information regarding procedures employed in this case?

A. This incident, Dr. Norcrooss had done a myelogram which showed evidence of deformity in the column of dye that is put in at the C-5-6 level, I believe, and spinal fluid protein and spinal fluid examination taken at the same time was normal. I bring that up because usually if there is severe or significant spinal cord damage we find reflexes in the spinal fluid which surrounds the cord. There were no abnormalities here. The myelogram showed this deformity. X-rays showed rather marked arthritis and stiffening of his spinal vertebrae and he was readmitted to the hospital after two weeks and laminectomy was done. The bony arch over the fifth and sixth cervical vertebrae was done (sic). Now, [134] that doesn't interfere with the motion or the joints or anything else, it simply moves the

(Testimony of Dr. Philip R. Van Horn.)

bony arch over the spinal cord, has nothing to do with bone or joint function.

The spinal cord was not remarkable on inspection and Dr. Norcross quite correctly cut the dentate ligaments to allow the spinal cord to (unintelligible). He found a ridge, a mass lying in front at the intervertebral disc level, which was most pronounced on the left, but present in a smaller degree on the right. And he apparently considers this to be a calcified herniated disc, which was causing spinal cord compression and which is treated by cutting these ligaments, allowing the spinal cord to ride backward and avoid any future pressure which might result from the bulge at the intervertebral ridge. Following this, he had a wound infection, and in his absence, April 11th, Dr. Siefert had to open up the wound. I talked to Dr. Siefert. The wound was—there was a little bit of a scare because the initial cultures taken, it was thought to be a very dangerous bacteria which required opening and draining. Actually, subsequent studies—and sometimes you can't tell for twenty-four hours, it takes a lab that long to get them; so that it was an ordinary staphylococcus. And it was quite sensitive to antibiotics, and that cleared up without trouble and was cleared five days later with proper healing.

Q. Well, Doctor, in connection with the bony prominence [135] that was found on operation, can you tell us what that condition is and what brings it about?

(Testimony of Dr. Philip R. Van Horn.)

A. Well, I don't know whether it was a bony prominence. He said it was a mass, a mass lying anterior. To explain, surgically, coming down, you are looking at the spinal cord surrounded in its sack with fluid, and in the spinal cord we can't pull it very far, and you are looking on a smooth spinal canal, you may see *a see* a ridge or bulge there. He, apparently, did not go outside to see the nature of this. We don't know. But, he took note that there was a ridge there. And unless we are sure it is lying laterally, we don't normally try to remove them, but we simply decompress them by cutting ligaments above, to cut them and relieve that pressure so it isn't necessary to go in front.

Q. Are such things common to find in connection with arthritis in the neck, Doctor?

A. Yes, ridges and bony spurs and outcroppings are very common with arthritis in the neck. In response to whatever causes arthritis, we get overgrowth of bone and these various ridges that occur, and they will cause deformities about the holes of the foramena. It deforms the holes through which the nerve roots leave the spinal canal and also the main canal. There can be irregularities and ridges. As a matter of fact, we see this condition with spinal cord compression; it occurs very commonly in elderly people spontaneously. [136]

Q. Incidentally, Doctor, with reference to the myelograms, did you have occasion to see the myelograms which were done? A. Yes.

(Testimony of Dr. Philip R. Van Horn.)

Q. I wonder if he could have those myelograms put in the shadow box for a moment.

The Court: It is entirely up to you. If you think it will be helpful. But if you are asking me about it, I would say I never have felt that anything is ever gained by looking at X-rays. The doctors say, "This thing here," and you see something, but it doesn't mean anything to you. I have looked at them by the hundreds, and unless you can see a clear line and see it is a fracture,—But the rest of it doesn't mean anything. I would rather have the doctor explain it than I would to look at X-rays. They never clarify anything.

(To the witness.) I hope I am not being too cruel to your profession.

The Witness: I have a feeling that way at times myself.

Mr. Martin: What I would like to have the doctor tell us about, your Honor, is just what these things that we see on the myelograms—just what you are looking at. That is what I had in mind.

The Court: Well, I don't say you shouldn't do that at all, but maybe the doctor can explain it.

The Witness: I might be able to describe it.

The Court: Would you rather use the X-ray?

The Witness: Well, it would only take a moment.

The Court: All right.

Mr. Martin: Do we have the myelograms, Mr. Clerk? I think they were especially marked. I don't think we need all three of them, Doctor. If you

(Testimony of Dr. Philip R. Van Horn.)

could just pick out the one which is most clear?

The Witness: The main thing that we see in the myelogram is this white shadow, is the heavy oil which casts a shadow on this X-ray. Now, this, I think the important thing to remember, we do see this defect here, and to a lesser degree you will note we see it pretty much in all of them. There is this little ridge. That can be defeating in that what we are—we are not looking at the two solids through. This patient is lying down, this is a heavy oil that floats along the bottom of this tube, floats along the bottom, so that you are looking down. Actually looking at it this way. And any small ridge across the bottom, it is like a boulder in a stream, will make a deformity. This is not a great big bar that is going all the way across the whole canal. This is merely a ridge in the bottom. As you see, he has certainly elsewhere (indicating), but more marked at this one level (indicating).

Q. You see more than one ridge there, Doctor?

A. Well, we see something out at these other levels, which is consistent with an arthritic back. And this, for instance [138] if a spinal cord tumor were present, where the whole canal wasn't completely blocked in, you would see this, with the patient lying down, practically standing on his head, it stops right there and is blocked off, but this is simply a stream on the bottom of the canal (sic). This does not outline the whole spinal cord or anything. Only the bottom of the canal, where there might be a small ridge which could be only an

(Testimony of Dr. Philip R. Van Horn.)

eighth of an inch high and still produce a great deformity.

Q. I see, Doctor. I take it between the time you first saw Mr. McQueen, your first examination, and the time of your second examination, there had been improvement in his condition, is that correct?

A. Yes, very marked improvement. In symptoms and findings that he showed.

Q. And do you have any opinion, Doctor, as to the—as far as the accident, I believe your record shows it to be May 29th, but I think the testimony in the case indicates it occurred May 27th, 1957; do you have any opinion with reference to the connection between the accident and the symptoms which later developed or which we saw in Mr. McQueen as time went on?

A. I think many of his symptoms occurred following the accident. I think he had a good deal—as I say, this is an unpleasant experience. He had neck pain increased from his arthritic neck. To what extent he had spinal cord compression, I am not entirely sure, I am not sure how much of that was a [139] normal tendency to exaggerate unsteadiness, feeling weak or uncertain, or whether it was organic. As I say, I am not sold on the organic, because it wasn't just supported by findings, but he did have pain, headaches, dizziness—not dizziness, I don't believe he mentioned that, but headaches, neck and arm pains, which could have been lit up by this blow. You wouldn't expect those to last forever. Normally, they subside. Their per-

(Testimony of Dr. Philip R. Van Horn.)

sistence over a long period of time makes one—usually we find it associated with tension, anxiety. A patient becomes concerned about his condition, he is worried, he is getting a little older, and that can keep symptoms going. Now, they were relieved by an operation to a marked degree. If there was any spinal cord compression, it is certainly not acting now, and in many respects his spinal cord is in better shape than it was before operation, and he no longer has the hazard from the old arthritis, as far as producing further cord compression, because the cord is loose from its attachments. I think he does have some neck pain which is going to take time to subside. I don't know how long.

Q. Incidentally, Doctor, does arthritis of the neck produce a limitation of motion in the neck of an individual? A. Yes, very commonly.

Q. I notice in the X-rays which were apparently taken at Peralta Hospital, they showed considerable arthritic change with some reversal of the curve at C-5, -6, and apparently an [140] arthritic fusion at C-6, -7. What do you mean by an arthritic fusion?

A. Well, in response to this, whatever it is, as I say, we don't know why arthritis, which is inflammation of the joints—the bone tends to put out spurs and eventually will fuse and stick together. We lose motion then, and he had this, as you say, these findings of rather severe arthritis in the neck.

Q. And by arthritic fusion, does it mean that one vertabrae is—— A. Apparently——

(Testimony of Dr. Philip R. Van Horn.)

Q. ——going with another?

A. ——joined to another, partly fused, yes.

Q. And incidentally, how many vertabrae are there in the neck? A. Seven vertabra.

Q. By seven, you mean cervical vertabra, down the neck?

A. From the neck to the shoulder—from the head to the shoulder.

Q. Well, with reference to the present symptomatology, Doctor, of neck stiffness and ache, has Mr. McQueen passed the convalescent stage of his operation and hospitalization?

A. No, I wouldn't think so.

Q. What do you think as far as the passage of time is concerned in connection with the present symptoms which he now has? [141]

A. Oh, I think I would not be at all surprised to have some one of these neck pains and stiffness and headaches for four to six months after an operation of this type.

Q. And incidentally, Doctor, as far as carrying on an occupation as a conductor, for instance, where he is in a caboose and doing mostly paper work and supervisory work, do you think that Mr. McQueen, after the convalescent stage is over, could return to that type of work?

A. Yes, I believe he could.

Q. As far as the spinal cord compression is concerned, I take it that the operation, whereas it did not remove the ridge, was designed so that the

(Testimony of Dr. Philip R. Van Horn.)

cord itself would not be held down or bound down tightly over the ridge, is that correct?

A. Yes.

Mr. Martin: I think that's all I have, your Honor.

Cross Examination

Q. (By Mr. Hepperle): Doctor, have you been certified as a specialist by the American Board of Neurosurgeons?

A. No, I have not taken the examinations. However, the United States Government requires at least board certificate or its equivalent to certify a man as a consultant. I belong to the College of Neurological Surgeons, which requires the same degree of training, and I have similar qualifications. I have not taken the examinations. [142]

Q. Now, you saw Mr. McQueen twice, once on February 2nd of this year, the other time May 4th; the first time before his operation, the second time after? A. That's correct.

Q. You didn't treat him? A. No, sir.

Q. And your examination was at the request of the Southern Pacific counsel?

A. That's correct.

Q. You reviewed the Southern Pacific Hospital record, and you yourself felt that the diagnosis listed there of lues or syphilis was not substantiated? A. Yes.

Q. And instead of spinal cord disease, you found on reviewing the Peralta Hospital record that the

(Testimony of Dr. Philip R. Van Horn.)

operation revealed that there was pressure on the spinal cord?

A. No, no, I didn't find the operation revealed there was pressure on the spinal cord. There was a ridge anterior. That may have been there for 20 years. It is possible to have a neck broken with an off-set of a half inch and no spinal cord compression at all. With an arthritic spine of this type, he could have had this ridge for a long time. And the spinal cord appeared perfectly normal. This is primarily a diagnosis which I make, which would be made by inference, and some of his symptoms, but there is no record of any spinal cord abnormality [143] on inspection, or actually on much organic testing.

Q. Do I understand, then, that it is your opinion that there was no pressure on the spinal cord here?

A. As I was trying to intimate, I find it difficult to be sure one way or another. I am a little puzzled by the fact that we did not, I don't believe, or the other examiners at the hospital, find objective findings which we usually see with real spinal cord pressure, in the way of objective findings and reflex loss, sensory disturbances, things of that sort.

Q. Well, that depends, doesn't it, Doctor, on what section of the spinal cord is affected?

A. Not necessarily.

Q. Well, for instance, the matter of atrophy;

(Testimony of Dr. Philip R. Van Horn.)

usually it results when the disc is pressing on the nerve root, isn't that right?

A. If atrophy occurring through the nerve root distribution, not on the cord.

Q. And both changes in sensation or muscle atrophy can result from pressure of a ruptured disc on the nerve root, can't they? A. Yes.

Q. And——

A. But only over the distribution of that root.

Q. Examining the diagram on the board, Doctor, if the pressure caused strain in the pyramidal tract of the spinal [144] cord, why then, you cannot demonstrate the pressure by clinical tests, isn't that right?

A. Not at all. There are definite tests for pyramidal tract loss; positive Dabinski, absent abdominal reflexes, spasticity, — those things, in a well-developed case. That is what you see in pyramidal tract disturbance or compression.

Q. Doctor, are you familiar with the book, "Lesions of the Cervical Intervertabral Disc"?

A. I have read it.

Q. ——by Spurling?

A. I have read it, but I am not familiar with every word of it.

Q. Well, would you disagree with this statement which accompanies the diagram which has been enlarged from this book and placed on the board——

Mr. Martin: I will object to counsel reading textbooks in cross examination.

Mr. Hepperle: I would like to submit authori-

(Testimony of Dr. Philip R. Van Horn.)

ties on that, your Honor, that it is proper in federal court.

The Court: Well, limit it to this question; I will overrule the objection.

Q. (By Mr. Hepperle): "Diagramatic representation of lines of stress in anterior spinal cord compression. The greatest strain is anterior, on tracts in which disturbance would not be demonstrable by clinical tests. [145] Secondary stress is directly on pyramidal tracts. The leg area is most lateral in pyramidal tracts, while the hand area is most medial. This explains the usual sparing of the hands in spinal cord compression."

A. Then if you spare the hand, how would we detect if the leg were not abnormal? What symptoms does he give for pyramidal tract dysfunction, other than spasticity, loss of control, abnormal reflexes? That's textbook basic neurology.

Q. Well, then, you disagree specifically——

A. I disagree with your interpretation of one remark taken out of that whole article.

Q. This is the complete description of the diagram, Doctor.

A. Perhaps of that diagram; but for instance, the spinal canal, the pyramidal tract, — unfortunately, we, in some of our surgical procedures, deliberately go in and cut the anterior portion of the cord to relieve pain below the body. If we get a sixteenth of an inch too high, we injure the pyramidal tract and we get spasticity, abnormal reflexes, loss of control, and there is no question about

(Testimony of Dr. Philip R. Van Horn.)

what you have got. And I think Spurling, who wrote the book, would be the first to admit it.

Q. The illustration, Doctor, comes from the Journal of Neurosurgery in an article by Kahn. But you specifically disagree with this sentence: "The greatest is anterior, on [146] tracts in which disturbance would not be demonstrable by clinical tests."

A. I don't disagree with that. What I am trying to say is, there can be minimal signs which would produce mild unsteadiness. But I had a man in my office who could barely stand, staggered all over in a wide-braced gait. That degree is usually associated with damage which you can demonstrate in the way of increased tone and spasticity. They are referring to minor degrees, where a patient is mildly unsteady, and mild degrees if spinal cord compression. I don't think any neurologist or any neurosurgeon in his right mind would say you can damage the spinal tract, the long tract in the cord, and not produce symptoms or clinical findings. That is basic. You don't do it. You would have malfunction, loss, paralysis, complete loss of sensation, loss of bladder control, loss of bowel control. And those are primarily in the anterior portion of the canal, of the cord. Now, that is if there is major compression. It is possible to have a mild degree, as I have maintained all along. But what I am puzzled about: Elderly people, we know spinal cord function starts to deteriorate gradually about 50. And a man of 80 years old is much less steady on his

(Testimony of Dr. Philip R. Van Horn.)

feet than you are, because part of his spinal cord function has been disturbed, and there are mild degrees which you cannot demonstrate with ordinary tests.

Q. In other words, Doctor, you don't believe there was [147] any spinal cord compression here?

A. No, I have not tried to give that impression. I have stated that if it were, it is on the relatively mild organic basis with considerable functional overactivity. It bounced right back to normal after surgery. Surgery, incidentally, does not always relieve this syndrome of spinal cord compression, which we see in elderly people, and this has.

The Court: The man would have gotten well without operation?

The Witness: That I can't say, your Honor.

The Court: What?

The Witness: I can't say. I think perhaps.

The Court: I was just trying to unravel all this by a direct question.

The Witness: Well, I don't mean to be vague about it. I am not clear in my own mind, except that he did not show the signs of severe spinal cord damage. He did show many of the signs you see when an accentuated or exaggerated form of—which is not uncommon in people. They put their worst foot forward when they are being examined, at times.

Q. I was coming to that, Doctor. Now, first you found Mr. McQueen to be fully cooperative with you on both examinations? A. Yes.

(Testimony of Dr. Philip R. Van Horn.)

Q. You did, did you not? A. Yes. [148]

Q. Next, you yourself formed an opinion that he was exaggerating, or you were suspicious of his complaints?

A. Yes, the organic findings didn't seem to bear out the degree of symptoms that he had.

Q. All right. Now, the purpose of the operation was to relieve pressure on the spinal cord, isn't that right? A. That's correct.

Q. All right; now Mr. McQueen said he was improved by the operation. A. Correct.

Q. Do you feel suspicious of that statement by him?

A. Not particularly. Many functional things are improved by operation. We see it countless times.

Q. Well, when the patient says that he is improved after the operation and the purpose of the operation was to relieve pressure on the spinal cord here, doesn't that, in your opinion, indicate that the patient is telling the facts?

A. I think he was telling facts. I don't mean to quarrel with that at all.

Q. You don't think he was exaggerating when he said the operation improved him?

A. No.

Q. As a matter of fact, people who are exaggerating or faking won't admit to improvement, will they?

A. Well, I don't mean exaggeration or faking. [149] There is a difference between deliberately doing something and bringing your worst foot for-

(Testimony of Dr. Philip R. Van Horn.)

ward, so to speak—showing how bad you are. I don't think he was consciously faking, no. Obviously, you cannot make a flat statement that malingerers always get worse and others get better. Unfortunately, in medicine it is not that simple. I have seen many people who have ailments of this type who are relieved, some with pain, where a sterile hypodermic of water has stopped the pain. They had real pain, but the mind seems to react, just as a suggestion. We have seen—I have a feeling that there was this considerable nervous, subconscious accentuation of disability. He was afraid, worried, anxious. The doctors told him they found a cause of the trouble, they corrected it, so he lost his anxiety; he is walking better. In either case, he is better, is over his symptoms. But in neither case, before or after, did he show objective reflex, motor signs; the electromyelograph tests for abnormal motor activity were normal. In those, none of the objective findings had changed one bit.

Q. Well, Doctor, if you assume that the patient is telling the truth, that this operation did improve his condition, doesn't that indicate the true diagnosis, that it was pressure on the spinal cord that was causing his difficulty?

A. Not at all. I think it is possible that the reassuring effect of the being told that he had what I am sure Dr. Norcross felt that he had, relieved it. But if there were an element of [150] tension and nervous accentuation, and then reassurance from the surgeon, it would relieve that essential. I

(Testimony of Dr. Philip R. Van Horn.)

don't know, I am perfectly willing to accept that he may have had some minor degree of spinal cord compression. If so, the spinal cord has been relieved and he is over his symptoms.

Q. Well, I am trying to understand your position here, Doctor. Is it your feeling, Doctor, that this operation was unnecessary?

A. Not at all, no. I think it was justified. I think it was a good move, and the result tends to prove it. I think his neck is better off now than it was even before the accident, in some ways. He had a neck which had burrs and ridges in it. It is decompressed and is free, now. [151]

Q. But, on the other hand, you feel there was no pressure on the spinal cord before operation?

A. There may have been some. I don't know how much; there was not enough to produce objective findings.

Q. On your first report, Doctor, you stated in your opinion—first, you didn't make a definite diagnosis in your first report, did you? Rather, you expressed an opinion that this situation was suggestive of degenerative central——

A. Degenerative central nervous system disease, and the nervous system includes the spinal cord.

Q. Yes.

A. "Degenerative central nervous system disease with functional accentuation."

Q. Now, again, if the operation improved the man's condition, wouldn't that tend to point to

(Testimony of Dr. Philip R. Van Horn.)

pressure on the spinal cord rather than a degenerative condition?

A. For the same reason I have given before, the mere fact that something follows something doesn't prove that that is the thing that did it. It may have helped. There may have been some element there, as I say.

Q. Well, an operation wouldn't help a degenerative condition, would it, Doctor?

A. I have seen operations help hysterical people, nothing wrong with them and they got over it. [152]

Q. Well, you don't suggest that Mr. McQueen is hysterical?

A. No, but I say there is a tendency toward nervousness, apprehension, and to make these symptoms he may have had worse. He is a man of an age where he might have some unsteadiness to start with. I don't know whether he had spinal cord compression. Spine, he could have. If so, it wasn't to a marked degree. He did show signs of accentuated, exaggerated unsteadiness without supporting objective findings.

Q. Well, Doctor, this particular operation performed here would not improve a degenerative condition of the spinal cord, would it?

A. Not normally.

Q. Now, you mentioned this matter of function.

A. Well, I spent about an hour explaining my position on that——

The Court: You say it would take an hour?

(Testimony of Dr. Philip R. Van Horn.)

A. No, I say I have been using about an hour trying to make this point here clear.

The Court: For the moment you kind of scared me.

A. Functional, I don't mean he is malingering. I don't think this is a deliberate thing. But I think everybody who has had any experience at all with illness knows that there is an emotional condition of the patient, his fear, his apprehension, his whole reaction to his particular symptoms [153] will color or influence that underlying problem, and sometimes even produce symptoms and findings.

Q. Now, isn't it common, Doctor, to find a functional element or a functional overlay when a patient has been subjected to a long period of pain and difficulty?

A. Yes. Depending on the individual, of course.

Q. Yes. In other words, it is quite common in amputees that there develops in addition to the injury and the amputation a functional element on top of the injury?

A. Yes, but again subject to wide variation.

Q. Now, you don't feel, then, that the improvement in the patient's symptoms following the operation indicates that this was a cord compression rather than a disease or a degenerative process?

A. I don't think I can necessarily prove that it was entirely, no. For instance, the operative note, the compression was primarily on the left, in which case we should have more compression involving the right side. There should have had some pain or

(Testimony of Dr. Philip R. Van Horn.)

temperature, fibrous cross-over, should have had some disturbance in front and sensation on the right side of his body.

If he were involving a—if it were truly a—(inaudible due to noise in courtroom)—why he didn't have more pain in the left arm. It is smaller on the right where he had most of the arm injury. There are inconsistencies [154] here which don't fit.

Q. You mentioned, Doctor, Mr. McQueen being struck on the head in 1949 by a rock. Did you know that he had it sewed up and returned to the job without loss of time there? A. Yes.

Q. And that it was some six months later that he was sent to the Southern Pacific Hospital by Dr. Jones? A. Yes.

Q. And the transfer slip that Dr. Jones filled out for him at that time, January 16, 1950, states that Mr. McQueen complained of "post-influenza weakness. Off since October 8, 1949."

A. Yes. I didn't mean to give the impression I thought this blow on the head was a direct consequence—direct cause of his later hospitalization. I am sorry if it came out that way.

Q. In other words, you wouldn't expect that six months after being hit with a rock he would develop a headache as a result of being hit by the rock? A. No.

Q. And you mentioned that while he was in the hospital he had some headache. Did you also notice that traction did not help him in that connection?

A. I don't remember that.

(Testimony of Dr. Philip R. Van Horn.)

Q. If it were an arthritic—— [155]

A. I will take your word for it.

Q. If it were an arthritic headache from his neck, you would expect traction to help it, wouldn't you?

A. Sometimes. Sometimes not.

Q. At any rate do you have in mind that the neurosurgeon that suggested that the traction be discontinued and a medical opinion obtained?

A. Could be.

Q. Did you have that in mind, Doctor?

A. No. I am not sure that I know what you are getting at.

Q. Well, calling your attention to the entry in the record that on April 12th, 1950, that he returned from his leave, he had no headaches, no dizziness, he felt fine, he wanted to return to duty, was given a return to duty, and his weight had increased up to 192 pounds from the 176 pounds that it had been, and if the patient had no further trouble with headache, why, you wouldn't say that he was disabled as of that time or up to the time of this accident that we are dealing with in this case, would you, Doctor?

A. No. I said he was in good health at the time he reported this injury, stated he was.

But as far as the traction, there is a note that he was treated with physiotherapy from January to April, and they don't do that for headaches or head problems. You [156] give physiotherapy because of

(Testimony of Dr. Philip R. Van Horn.)

neck and skeletal and bony problems. Chiefly arthritis, I believe.

Q. Well, they looked for a physical and a medical cause of the headache and never did find it, did they?

A. I don't have all the records, but I know he was treated with physiotherapy, which is what they usually use for skeletal or arthritic type of pain.

Q. Now, did you yourself on either one of your examinations note any vesiculations in Mr. McQueen's legs or at the base of his thumb?

A. No, I did not.

Q. If I understand your testimony and your written report, you can't now at this time evaluate the permanent residuals and their degree in this case?

A. As far as his head and his neck symptoms are concerned, yes.

Q. You would want to wait at least another four to six months and re-examine him at that time?

A. Yes.

Q. Now, is it your opinion, Doctor, that arthritis disabled Mr. McQueen simultaneously with his accident of May 29th, 1957? A. No.

Q. As a matter of fact, lots of people his age have arthritis without symptoms? [157]

A. That's right.

Q. And if they sustain an accident such as this, for the first time they have pain and difficulty?

A. That is correct.

Q. And if Mr. McQueen had been working regu-

(Testimony of Dr. Philip R. Van Horn.)

larly over the years before this accident, making over $7,000 a year as a conductor and brakeman, you wouldn't say that he was disabled before the date of this accident, May 29th, 1957?

A. Other than this period of 1950, I believe, when he was off from January to April.

The Court: Aside from that.

Q. (By Mr. Hepperle): Aside from that.

A. That's right.

Q. In other words, from the time he went back to work in 1950 until 1957 you would not say he was disabled during that period of time?

A. Apparently not.

Mr. Hepperle: Thank you. That is all.

Redirect Examination

Q. (By Mr. Martin): Just one matter, Dr. Van Horn: Dr. Norcross on his first examination found that a troublesome problem in this particular instance was the presence of fasciculation in both calves.

"These indicate that there may be some degenerative [158] disorders of the nervous system not heretofore recognized."

Was that substantially your view on your first examination, Doctor?

A. Well, I didn't find it. I didn't notice fasciculations, nor apparently did anybody else, in the calf. All this period of hospitalization when he was looked at by quite a number of competent people who were looking for diagnostic points of that

(Testimony of Dr. Philip R. Van Horn.)

type. There may have been there a fissiculation, which are bursts of muscle quivering. They are not always—they can occur from fatigue and irritability, and sometimes even from an organic standpoint, they tend to come and go.

But at least at the time that I saw him, and on the record from the examination of others, nobody noted it other than some quivering of the thumb, which I think was not a true fasciculation. It would be rather unusual to have true fasciculation or root compression. Usually we see it in the long muscles of the legs and trunk.

Q. I realize, Doctor, we are still in this period of convalescence from the operation, but based upon past experience in similar cases, in your opinion, is there going to be further improvement here?

A. Yes, I think he is going to improve.

Q. And do you feel that Mr. McQueen will be permanently disabled as a result of this thing?

A. No, I don't think he should be. Many people have had this operation and are back to work. I don't think he should go back to work as a heavy worker, but from the type of work he is doing, sedentary desk work, I see no reason why he shouldn't.

Q. Incidentally, you mentioned an electromyograph was started on the arm in this case, Doctor. I note that that is in the hospital records. For general information, what is an electromyograph?

A. It is an electrical test, a measurement of the electric current produced by any muscle. Any

(Testimony of Dr. Philip R. Van Horn.)

living tissue, as a matter of fact, will cause a minor electric current which can be measured. They are more familiar in an electro-cardiogram or heart measurement of heart currents. We can do that with the various muscles.

A paralyzed muscle, for instance, will show a different electric current than one that is normally active. But it is subject to wide variations, and unless there is an elaborate research setup you can't go on one or two tests of this type.

Q. That test, as far as it went, was normal, was it, Doctor?

A. That was perfectly normal, meaning only that the muscle testings were normal.

Mr. Martin: Thank you, Doctor. I think that is all. [160]

Recross Examination

Q. (By Mr. Hepperle): Doctor, the purpose of the myelogram performed by Dr. Norcross at Peralta Hospital was to determine whether there was pressure on the nerve roots of the spinal cord to help in diagnosing as to whether this was a degenerative condition or whether it was something that could be demonstrated by the myelogram, isn't that right? A. That is correct.

Q. Do you disagree with the radiologist at Peralta Hospital that this was a ruptured disc in the neck?

A. That is not a radiographic diagnosis. The radiologist doesn't make pathologic diagnosis.

In other words, we see ruptured discs which will

(Testimony of Dr. Philip R. Van Horn.)

act like spinal tube tumors. No radiologist will—they can make an educated guess. I think he describes an indentation and deformity which you can see there and concludes it could or probably is due to a disc.

Q. Well, what he says, "posterior protrusion disc 5-6," that means a ruptured disc, doesn't it?

A. Is there a question mark after that, sir?

Q. Yes, there is.

A. All right, that is your answer on that.

Q. It is your opinion, then, that there was no rupture of the disc here? [161]

A. I don't know. I wasn't there at surgery. The man who was there did not treat it as a true soft rupture, he treated it as a hard calcified rupture which had either been there a long time or was an arthritic spur. Beyond that I can't say. I would have done the same thing if it were my patient, probably.

Q. Well, this is a common way of treating a condition where there is room to sever the ligaments to give the spinal cord more room, isn't it?

A. Yes.

Mr. Hepperle: That is all.

The Court: No more, now.

Mr. Martin: No more, Judge?

The Court: No. Each of you has had two cracks and that is enough. It doesn't elucidate the matter, anyhow.

Mr. Martin: All right.

(Witness excused.)

Mr. Martin: I should like at this time to offer in evidence Rule 2061 of the Safety Rules of the Southern Pacific Company governing employees in train, engine and yard service, which rules were effective at the date of this accident.

Mr. Hepperle: To which we object, your Honor, on the ground that——

The Court: May I have it so I can see what it is? [162]

Mr. Martin: 2061, your Honor. (Handing document to the Court.)

The Court: What is your objection?

Mr. Hepperle: We object, your Honor, upon the ground previously stated in my motion to strike, that this would inject into this case the doctrine of assumption of risk, which is abolished by the statute, Section 54 of 45 U.S.C.A., and is a device designed to enable the defendant——

The Court: I think, counsel,—I don't want to interrupt you, but I think there is a perfectly good objection to this rule, but not the one you are making.

I am not taking sides, but I don't see why we have to get into an elaborate discussion of the question which you raise. I would hold that this rule is not applicable because there is no evidence that the train was entering or leaving grounds at the time, or was approaching where a stop is to be made or speed reduced, and therefore it is not applicable.

Mr. Hepperle: Yes, your Honor.

The Court: I would see no objection to the intro-

duction of the rule if the evidence in the case would make it applicable, Mr. Martin.

Mr. Martin: As I remember the evidence, your Honor, they were entering the Oakland Yard.

The Court: Oh, no, no. He said they entered the [163] yard at Richmond, two miles, and they had made a stop and were proceeding on. There is nothing to show that they were at that time entering or leaving a yard or approaching a place where a stop was to be made or speed reduced.

Otherwise this rule, if I were to permit this rule in evidence, it might have applicability. I think it would be error and it might be erroneously availed of in the absence of basic evidence to sustain it.

If there were evidence of that type in the case, then the rule might be applicable. I am not going to rule on that. That would be speculative.

I will sustain the objection on the grounds that I have stated.

Mr. Martin: Very well, your Honor.

The Court: I think you had better have that given to the reporter, Mr. Martin, so he can know what the rule is.

Mr. Martin: Thank you, Judge.

The Court: Perhaps have it copied so that your objection will apply to something that is in the record.

The Clerk: We can mark it for identification.

The Court: Whichever way you wish.

Mr. Martin: I wonder, your Honor, if counsel might approach the bench for just a moment?

The Court: Certainly.

(Consultation at Judge's bench off the record.) [164]

The Court: Members of the jury, I said to you this morning that I thought you would get the case this afternoon, but no one can foretell how long doctors are going to take. That is partly their fault, partly the judge's fault, partly the lawyers' fault, so we won't blame anybody. But they do take a long time.

If we had gone on now and the lawyers had argued the case and I were to instruct you, you probably wouldn't get the case before dinnertime, and that is too late to keep you. Many of you come from places outside San Francisco, and I don't think that is the right thing to do.

So instead of keeping you here now to listen to the arguments, you will have to come back tomorrow morning anyhow to get the case.

There may be very brief testimony in the morning, if there is any at all, and the case will then be argued and you will have the case before noontime tomorrow. I think that is better for you than trying to keep you here late tonight. Don't most of you agree to that? I can see that you do.

So will you please come back tomorrow morning at 10:00 o'clock and we will finish up then.

(Thereupon the jury left, and proceedings on settling of instructions were had outside the presence of the jury, after which an adjournment was taken to tomorrow, Wednesday, June 3, 1959, at 10:00 a.m.) [165]

Wednesday, June 3, 1959, 9:30 a.m.

The Clerk: Harry J. McQueen v. Southern Pacific Company, further trial.

Mr. Martin: Your Honor, there is just one matter I would like to clear up with Mr. McQueen which will take just a couple of questions. There is some question in my mind as to where this stop occurred and I would like to clear that up.

Mr. McQueen, would you take the stand for a moment?

HARRY J. McQUEEN

recalled; previously sworn.

The Clerk: Let the record show Mr. McQueen has been sworn in this case.

Cross Examination—(Continued)

Q. (By Mr. Martin): Mr. McQueen, if I recall the testimony you gave earlier, you made a stop in the yard there at a signal and got out and observed the signal, is that correct?

A. You say I got out?

Q. Well, you made a stop for a signal before the emergency stop that was made, is that correct?

A. Yes, we made a stop.

Q. All right. Now, can you tell us which signal that was? [166] Was there any identification for it, or can you tell us where it is located?

A. Well, it is located at what they call the Desert Yard.

Q. The Desert Yard? A. Yes.

(Testimony of Harry J. McQueen.)

Q. And then was it the next signal where the emergency stop was made after that one?

A. Yes.

Q. And how would you describe that signal? In railroad language, what is it called?

A. Well, it's a mask signal.

Q. A mask signal? A. Arms on it.

Q. Does it have any identification? That is, is it near any particular point in the yard to describe its location?

A. I don't know. Word that again, please.

Q. I say, is there any way that someone who was familiar with that yard could identify where the signal was? Was it the only mask signal in the yard? A. Oh, no.

Q. Is this first signal you stopped at, the Desert signal, is that the only signal in the yard known as the Desert signal?

A. Well, I said the signal was located at the Desert—it isn't a Desert signal; it is just located at the Desert [167] crossing.

Q. At the Desert crossing?

A. Yes, that's right, where the highway crossing goes into the desert. I am just defining where the signal was located.

Q. That is what I was getting at. And that is the only signal that is at that crossing, is that correct?

A. On that track, yes, one on each track.

Q. And the track you were operating on, was it on the main line or was it off the main line?

A. It is known as 1 and 2 track.

(Testimony of Harry J. McQueen.)

Q. 1 and 2? It would not be the main line, then, is that right? A. No.

Q. You had gone off the main line at some point some distance before you got here, is that correct?

A. That is right.

Q. And so we can clear up the matter, the signal where the emergency stop was made was the next signal after the signal at the Desert crossing, is that correct?

A. The signal I speak of, yes, at the Desert crossing.

Q. Yes. And this signal where the emergency stop was made was the next signal after that?

A. That's right.

Mr. Martin: Thank you. That is all I have. [168]

(Witness excused.)

Mr. Martin: Call Mr. Turner.

EUGENE TURNER

called as a witness on behalf of the defendant; sworn.

The Clerk: Please state your name to the Court and to the jury.

The Witness: Eugene Turner.

Direct Examination

Q. (By Mr. Martin): Mr. Turner, you are employed by Southern Pacific Company, are you?

A. Yes, sir.

Q. And what is your position with the company?

(Testimony of Eugene Turner.)

A. I am a train master with the Southern Pacific Company.

Q. And what is a train master?

A. Well, the train master is an individual on the railroad that is assigned to a portion of the district that has charge of the direction and movement of the train.

Q. What has been your—how long have you been with the railroad, Mr. Turner?

A. Twenty-four years.

Q. And as far as your background is concerned, what jobs did you hold before you became train master?

A. I was a brakeman for six years and a conductor for nine years and I have been a train master for nine and one-half [169] years.

Q. What division of the railroad are you attached to?

A. I am attached at the present time to the Niles District of the Western Division.

Q. Does the Western Division include the West Oakland Yard? A. Yes, sir.

Q. And has all your experience as brakeman, conductor and train master been in the Western Division? A. Yes, it has.

Q. Are you familiar with the West Oakland Yard, Mr. Turner? A. Yes, I am.

Q. Mr. Turner, in your capacity as brakeman, conductor and train master, have you had frequent occasions to ride freight trains aboard cabooses?

A. Yes, sir.

(Testimony of Eugene Turner.)

Q. And have you had experience in riding trains on cabooses where emergency stops have been made? A. Yes, I have.

Q. Incidentally, we have here some photographs of a caboose. I will show you Defendant's Exhibits A and B. Have you had experience in riding on cabooses of the general nature of the one you see there in the photograph? A. Yes. [170]

Q. Is that a common type of caboose on the railroad? A. Yes, it is.

Q. And where an emergency application is made on a freight train, emergency application of air on a freight train of some ninety-odd cars—ninety-two cars—at a speed of six to eight miles an hour, can you tell me, based upon your experience and from an experienced man's standpoint, is there any indication in the caboose that an emergency application has been made? A. Yes, there is.

Q. What indication do you get in the caboose?

A. Well, you can hear the snapping sound of the piston in the brake equipment as it goes into the emergency application. You can also hear the wheels, the shoes of the brakes as they clamp up against the wheel.

Q. Now, an emergency application of the brakes, can you tell me whether or not that is the quickest application that can be made?

A. Yes, it is.

Q. And this sound that you hear, can you hear that over the noise of the running of the train at a speed of six or eight miles an hour?

(Testimony of Eugene Turner.)

A. Yes, definitely.

Q. Are you familiar with the term known as "slack action"? A. Yes, I am. [171]

Q. Will you tell us generally what slack action is?

A. Well, slack action to a railroad man is the bunching of cars in a train. By that I mean that one car couples into the car ahead of it until all the cars are up against one another and there is no movement between the engine and the caboose.

Q. And where the stop is made from the head end, does that bunching of cars go from the head end to the rear or vice versa?

A. From the — Well, it would naturally start with the head car going against the engine and so on, until the caboose is against the next car—next car ahead of the engine.

Q. And following an emergency application of air, this noise that you have told us about of the piston, is that a brake piston of some kind?

A. Yes, that is the piston in the brake equipment that applies the brakes, whether they are in emergency or in service application. In service application you never hear the equipment when it is being applied.

Q. But in emergency application, I take it that it is applied more rapidly than it is in a service application?

A. That is correct. It is applied more rapidly and makes a loud noise.

Q. And with a ninety-two car train, with the

(Testimony of Eugene Turner.)

noise of the piston which actuates, would that noise be heard before [172] or after the occurrence of slack action?

A. That would be heard before, depending on the movement of the train.

Q. And at a speed of six to eight miles an hour in a ninety-two car train where an emergency application is made from the engine, can you tell us from your experience about how much time would elapse between the time the piston is applied and the time the slack action occurs in the caboose?

A. Well, at that rate of speed it would be approximately between four and eight seconds.

Q. Interval of time between, is that correct?

A. That is correct.

Q. You have heard the description of where this stop was made here, that is, the signal next—in a westerly move the signal following the signal at the Desert crossing? Are you familiar with the Desert crossing, Mr. Turner? A. Yes, I am.

Q. About how much distance separates those two signals, if you recall?

A. Oh, I would say approximately forty cars.

Q. You use the term "cars." Is that the way you measure distance?

A. Yes, that would be the distance in freight cars based on forty feet per car.

Q. I see. So it would be forty times forty, sixteen [173] hundred feet, is that right?

A. That's right.

Q. With reference to the crossing, assume an

(Testimony of Eugene Turner.)

emergency stop was made at the crossing next after the Desert crossing, can you tell us within the term "yard" where within the West Oakland Yard that would take place, generally speaking?

The Court: Where what would take place?

Mr. Martin: The emergency application at the signal, your Honor.

The Court: In other words, you want to know where that signal is in the yard?

Mr. Martin: In the yard, yes, sir.

The Witness: Well, that signal is about a third of a mile from the point where the train actually goes into the yard tracks.

Q. (By Mr. Martin): And by "yard tracks" you mean what?

A. Well that is the point where the train is yarded and where the train is worked by car men and broken up and the cars are switched for placement in industries.

Mr. Martin: I think that is all I have. You may cross examine.

Mr. Hepperle: No questions, your Honor.

The Court: That is all.

(Witness excused.)

Mr. Martin: At this time, your Honor, the [174] defendant will again offer Rule 2061, which your Honor has already seen.

Mr. Hepperle: We renew our objection, your Honor, on all the grounds heretofore stated.

Mr. Martin: I believe the testimony of this witness would make the rule applicable, your Honor.

The Court: I am inclined to sustain the objection.

Mr. Martin: All right. One thing, your Honor: This rule does not appear in the record and I would like at an appropriate time, in the absence of the jury, to read it into the record for the reporter.

The Court: Yes, we mentioned that yesterday.

Mr. Martin: I tried to do that, your Honor, but he said there was no way of doing it without some formal motion.

Mr. Hepperle: Why not mark it for identification?

The Court: Mark it for identification so that there is no question that the record shows what rule you have offered.

Mr. Martin: Very well, your Honor.

(Rule No. 2061 was thereupon marked Defendant's Exhibit C for identification.)

[See page 187.]

Mr. Martin: I believe that will complete the defendant's case.

Mr. Hepperle: Mr. Martin has been able over the [175] evening recess to check the figures on wage increase, your Honor. I offer these two groups as plaintiff's exhibit next in order.

Mr. Martin: I will agree that those figures check out, although, if your Honor will take a look at them, I don't think that they are especially illuminative in this case.

The Court: It shows the basis of pay in May 1957, November 1957, May 1958, November 1958. I don't understand what the—Strike that out.

This pay base for the time stated is for freight service at the Western Division. I don't understand the conductor's—(inaudible to the reporter).

Mr. Hepperle: Suppose we eliminate that, your Honor.

The Court: Well, you can make such comments on it as you want. Let the basis of pay for freight service be admitted. That will be exhibit what?

The Clerk: Plaintiff's Exhibit 5 introduced and filed into evidence, your Honor.

(Basis of pay was thereupon received in evidence and marked Plaintiff's Exhibit No. 5.)

[See page 186.]

Mr. Hepperle: Plaintiff rests, your Honor.

The Court: Both sides have rested. Are you ready to argue the case now, gentlemen? [176]

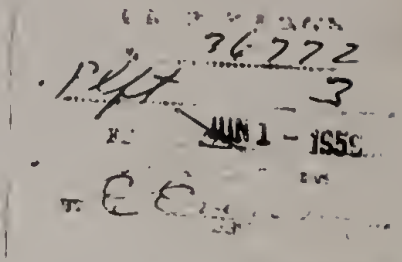
Mr. Martin: Yes. Before we argue, your Honor, I wonder if we might have a brief word with you at the bench?

The Court: Certainly.

(Consultation between Court and counsel off the record.) [177]

[Endorsed]: Filed August 25, 1959.

McQueen v SPCo



Past Earnings

1954	7266.34
1955	7077.14
1956	7385.70
1957-Jan	492.62
Feb	579.13
Mar	647.49
April	742.04
May	738.56

3199.84 – mo average 639.96 – (for 12 months 7,679.52)

Wage loss to date	15,359.04	.00 *
Peralta Hospital	1,359.07	15,359.04
	11.72	1,359.07
	40.00	11.72
		40.00
DR Morton B Cz-/ton (Anesthesia)	90.00	90.00
		60.00
Nurse Fagerstrome	60.00	20.00
		100.00
Nurse De Chantal	20.00	100.00
		2.00
Nurse Daniels	100.00	50.00 ~~25.00~~
		750.00
Nurse Dempsey	100.00	170.00
		~~18,086.83~~ *
Medical Center Clinical Lab	2.00	18,136.83
DR Norcross		
~~Myelogram~~	~~50.00~~	
Laminectomy	750.00	
DR H. Jack Siefert	170.00	
DR Wm Chew	———	
	~~18,086.83~~	
	18,136.83	

PLAINTIFF'S EXHIBIT No. 3-A

William B. Chew, M.D.
419 Thirtieth Street
Oakland 9, California
GLencourt 1-7414

May 29, 1959

To: Hepperle & Hepperle
Attorneys at Law
1956 Hobart Building
San Francisco 4, California

For Professional Services Rendered
Harry McQueen

May 6	Diagnostic Consultation and Examination	$25.00
	Laboratory	14.00
May 8	Biopsy-Bone marrow	30.00
May 12	Office	7.50
May 12	Lab	1.00
May 18	Lab	3.00
May 22	Office	7.50
	Lab.	3.00
	Lab.	4.00
		$95.00

[Endorsed]: Filed June 2, 1959.

PLAINTIFF'S EXHIBIT No. 5

BASIS OF PAY

Western Division—Western District
Conductor's Passenger Guarantees

January 1, 1957

Passenger Service	Monthly Guarantee
Oakland Pier—Sacramento via Suisun	$537.70
Oakland Pier—Gerber	537.70
Oakland Pier—Fresno	537.70
Oakland Pier—Sacramento via Livermore	532.60
All Other Passenger Service	530.70

May 1, 1957

Oakland Pier—Sacramento via Suisun	$544.90
Oakland Pier—Gerber	544.90
Oakland Pier—Fresno	544.90
Oakland Pier—Sacramento via Livermore	539.80
All Other Passenger Service	537.90

November 1, 1957

Oakland Pier—Sacramento via Suisun	$537.70
Oakland Pier—Gerber	573.70
Oakland Pier—Fresno	573.70
Oakland Pier—Sacramento via Livermore	568.60
All Other Passenger Service	566.70

May 1, 1958

Oakland Pier—Sacramento via Suisun	$583.30
Oakland Pier—Gerber	583.30
Oakland Pier—Fresno	583.30
Oakland Pier—Sacramento via Livermore	578.20
All Other Passenger Service	576.30

November 1, 1958

Oakland Pier—Sacramento via Suisun	$602.50
Oakland Pier—Gerber	602.50
Oakland Pier—Fresno	602.50
Oakland Pier—Sacramento via Livermore	597.40
All Other Passenger Service	595.50

[Endorsed]: Filed June 3, 1959.

DEFENDANT'S EXHIBIT "C"

(For Identification)

Southern Pacific Company (Pacific Lines) Safety Rules—Governing Employes in Train, Engine and Yard Service, Effective November 15, 1952.

* * * * *

2061. On trains entering or leaving yards, or when approaching places where stop is to be made or speed reduced, take necessary precaution, particularly in cabooses, to avoid injury which might result from sudden unexpected movement.

* * * * *

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Proceedings On Settlement of Instructions Had Outside The Presence of The Jury:

June 2, 1959, 10:00 A.M.

Appearances: For the Plaintiff: Messrs. Hepperle & Hepperle, by Robert R. Hepperle, Esq. For the Defendant: Messrs. Dunne, Dunne & Phelps, by John Martin, Esq. [1]

The Court: I assume the case will go to the jury with very little change in the record as it stands now. Do you want any discussion of instructions now or would you rather wait until morning?

Mr. Hepperle: I would prefer it now, your Honor.

The Court: I assume all that we would have to prove in the way of evidence would be some figures that you have on earnings or some witness that might testify about the matter of brakes or something of that kind?

Mr. Hepperle: Yes, your Honor.

The Court: Under those conditions, why, I will just give the usual instructions, which are very simple instructions, in this case. I don't see any basis for giving any instructions on contributory negligence. I don't see any basis, really, for doing much more than telling the jury that the main point in the case is the amount of damages.

Mr. Martin: The only thing I had in that regard, your Honor,—of course I hadn't anticipated that this rule would not go in—was that there was testimony in the case from the fireman that when an emergency application of air is made there is a noise which is heard in the caboose, which precedes the actual slack action, and whether an experienced brakeman of Mr. McQueen's character, assuming that such a warning was present, although I realize there is a conflict on that in the evidence, but assuming such a warning was [2] present under the testimony of the fireman, whether he should have taken any steps by use of the grab iron.

The Court: Well, of course the fireman, as I recall it, did not testify there was any appreciable difference in time and the conductor, who was in the rear, said it was either simultaneous or practically simultaneous, or some such language as that.

Mr. Martin: I am aware of that, your Honor.

The Court: I don't think there is any evidence to warrant giving an instruction as to contributory negligence, and on the state of the record I think it would be unfair to give such instruction in this case. There is no evidentiary matter upon which to base the rule of contributory negligence.

There is a perfectly good rule that should be given in any case where there is any evidence that the jury can evaluate to which the rule of contributory negligence can apply, but I don't see that there is any in this case, and in the present state of the record, Mr. Martin, it seems to me that I should tell the jury, just give them the ordinary rules of how to evaluate testimony, and tell them that on the present state of the record there doesn't appear to be any conflict in the testimony on the question of liability and that they should devote themselves to considering the amount of damages, because if I gave some other instruction that [3] would lead them to the question of determining liability and they brought in a verdict in favor of the defendant, I would feel that I would have to set it aside. There is no evidence in the case upon which they can make a finding.

Mr. Martin: Well, on contributory, of course they couldn't bring in a verdict for the defendant.

The Court: I beg your pardon? Oh, you say they couldn't——

Mr. Martin: Under the F.E.L.A., no.

The Court: So I figure that the simplest thing for me to do is to instruct the jury very simply on this case except to give them the rules of the damages, as to what they can take into account in the case of damage, how to evaluate the evidence in that regard.

It seems to me that while I didn't necessarily give them an instructed verdict on liability, I think I ought to tell them that there doesn't appear to be any conflict on the question of the causation of the accident, and that under those circumstances the jury should spend their time determining the amount of damages. I don't like to give them an instructed verdict, but I think the case justifies it.

Mr. Hepperle: We do think, your Honor, purely for the education of the jury in view of the claim made by counsel in his opening statement, that there should be a statement that in addition to the negligence of the tower man [4] being admitted, that the plaintiff does not assume the risks of injury from the negligence of the tower man.

The Court: I think you are entitled to that. I just give a few instructions very generally and very simply as to the Federal Employers' Liability Act and regarding the liability of the employer and employee under that because I think the jury should know the setting of the case, because they might wonder why they are hearing a suit by the employee against the employer. They live in a state where those things are unknown. The ordinary person doesn't know what this means.

Mr. Martin: That's right.

The Court: Is there anything special you have in mind, counsel?

Mr. Martin: I can think of nothing in particular, Judge. I respectfully disagree with the Court on the issue of contributory negligence, but that issue has been decided by the Court. Other than that I don't think of anything.

The Court: I just don't know that there is any evidence. If you think I am wrong, if you have something in particular to point out that the record sustains, I would be glad to hear it.

I don't remember anything that would sustain a —any testimony upon which an instruction on contributory negligence would apply. [5]

Well, I will have to make a decision, that's all. I think you might spend your time arguing the question of damages because that is the field of disagreement.

Well, you might decide whether you are going to have your man testify in the morning on those figures, and we can clear that up rather rapidly and you can be prepared to make your arguments in the morning.

(Thereupon an adjournment was taken to Wednesday, June 3rd, 1959, at the hour of 10:00 o'clock a.m.) [6]

[Endorsed]: Filed August 17, 1959.

[Title of District Court and Cause.]

CLOSING ARGUMENT OF COUNSEL AND INSTRUCTIONS OF THE COURT

June 3, 1959

Closing Argument For Plaintiff

Mr. Hepperle: May it please the Court, and ladies and gentlemen of the jury: It is now the time for argument of counsel. You have perhaps heard on previous occasions on which you have served that the purpose of argument is to help you in your deliberations. I feel a very strong sense of duty here toward Mr. McQueen. I want to do my dead level best to help you in my argument here.

You perhaps have heard in other cases, particularly important in this one, that it is fortunate that when you people enter the jury box and take your oath, you are not required to leave your common sense behind. I say to you a little common sense simplifies this case considerably. There is really only a single issue here and that is, how much to award this man. There was an admission of negligence when the trial began here. There is no basis for any claim of contributory negligence. On this record the Southern Pacific Company is one hundred percent liable, so that it is just a question of how much to award this man.

Now, on our side you have heard the evidence of the fireman, the conductor, Mr. McQueen, the hospital records, Dr. Norcross. On the defense side I say it is an empty, barren defense. With the whole

railroad to draw from, with the whole Southern Pacific Hospital to draw from, we don't have any defense in this case. [1]

There is mention of headaches back in 1950 when Mr. McQueen was in the hospital for the flu. In his opening statement Mr. Martin speaks of arthritis. You hear Dr. VanHorn yesterday. I say, ladies and gentlemen, there is no defense here.

Now, this being a civil case, the rule is that the plaintiff should prove his case by a preponderance of the evidence, and you have perhaps heard that the rule here in a civil case is different from in a criminal case. In a criminal case the proof must be beyond a reasonable doubt and to a moral certainty. In this case, a civil case, it is a matter of the preponderance of the evidence.

This is many times illustrated by the old-fashioned Bean scale where you put the evidence in favor of a proposition on one side, the evidence against it on the other, and whichever way the scale tilts, if it tilts in favor of the evidence supporting the proposition, why, the preponderance has been met. It is a matter of which of the two is the more convincing.

Now, I say on that, way beyond the matter of preponderance you have conclusive proof here of everything important in this case. This accident was a tragedy to this man. It ruined him. It leaves him now with a future to look forward to of a clouded hopelessness.

What kind of a man do we have here? He is a good man. He worked regularly. He was pro-

moted to conductor. He was making better than $7,000 a year. He is an innocent victim [2] here of a disaster. He is disabled. His life is made miserable.

Now, as we mentioned in the beginning of the case, this case comes under the Federal Employers' Liability Act. And on the evidence as it is here, it is plain, simple, clear and conclusive. The purpose of this federal law is to compensate these injured men for injuries negligently inflicted upon them by the railroad or by the other employees of the railroad for which the railroad is responsible.

Money itself can never be an adequate compensation for injuries such as these. Money itself can never take the place of health and happiness. It is the only system that our courts have been able to devise in this country, but at best it's only an attempt to compensate the man.

This man has sustained a terrible loss. He is not the same man and never will be.

Now, the railroad is liable for its negligence. That's the first point. They admit their negligence, so we are over that part with the admission.

The second thing is that if the railroad's negligence in whole or in part caused this man's accident, injury and disability, if the railroad's negligence even in the slightest contributed to it, he has made his case.

One further thing: Mr. McQueen, under this federal law, shall not be held to have assumed the risks of his employment [3] in any case where his injury resulted in whole or in part from the negli-

gence of the Southern Pacific Company or its other employees.

So, with those principles, we have absolute 100% liability here. But for this admitted negligent handling of the signal causing this violent train stop, there wouldn't have been any accident, there would have been no injury.

Now, following the accident and injury, following the period of time that he was both an outpatient and an in-patient at Southern Pacific Hospital, Mr. McQueen found himself discharged without a return-to-duty, condemned by a diagnosis on the record of degenerative disease of the spinal cord and another diagnosis of syphilis. The evidence now proves conclusively that both of those diagnoses were wrong.

There is an attempt to suggest that Mr. McQueen is a fake or a phony or was exaggerating. Use your common sense, ladies and gentlemen. Look at the whole picture here. A faker or exaggerator, he doesn't, with his lawsuit coming up soon, first have a myelogram; second, have a dangerous, expensive operation; next, admit improvement as the result of the operation; and next, spend lots of money in an attempt to get better, to help out the defendant Southern Pacific Company which had already washed its hands of him.

This man has shown good faith at all times. There can be no real basis for any claim of exaggeration on his part. [4] He had this myelogram. It showed this condition. He could have stopped there, could have come into court here and shown you the myelo-

gram films, have a doctor tell you about what they showed with respect to spinal cord compression, and how he was in a situation where a jolt or jar, a further whiplash, could leave him paralyzed for life. He could have complained about the hazards of operation, but it would have been cruel to have this man go any further without attempting to relieve his condition.

On top of that, the findings on the operation itself prove the diagnosis, prove—that is, the true diagnosis—prove the injury and cause of the disability and, in addition, prove conclusively that this is not a disease; this is not a degenerative condition. This was a ruptured disk which caused pressure on this man's spinal cord and which has caused him to be disabled ever since the happening of the accident.

Instead of having the battle of radiologists or expert witnesses over their interpretations of the X-rays alone, this man went ahead with his operation. Dr. Norcross, who saw the condition, who performed the surgery that he told you about, was able to give you the exact condition, the exact cause of the disability; and you will recall Dr. Norcross explained to you how this accident was the cause of Mr. McQueen's pain, difficulty and disability.

Now, there is a suggestion that a man is all through at [5] age 65, but the record here stands undisputed and undenied, ladies and gentlemen, that there is no compulsory retirement age for conductors or brakemen on the Southern Pacific.

Perhaps you have heard of one of the law schools here in San Francisco, part of the University of

California, Hasting Law School, and their 65 Club. Perhaps you have heard how professors are arbitrarily, in other places, forced to take their retirement at a certain age and how Hastings has taken advantage of that and how, by hiring those men who were still able and distinguished, has assembled one of the best faculties in the country. Indeed, there was a joke that one professor applied at age 64 and they told him he was too young. He has yet to come back next year.

Now, I hope that no one tells me that I am all through at age 65, or that I have to do this or that I have to do that. So far as Mr. McQueen is concerned, it is his choice. And it is a matter of more than just the financial ability to retire; it is the choice of the individual as to what he wants to do. How many people have you seen who did retire or were forced to retire and then found themselves bored, listless, missing the occupation which they had enjoyed? It is up to Mr. McQueen. It was up to him. It is no defense to this company to say that he was along in years and, therefore, they didn't owe him anything.

Now, again in the opening statement of Mr. Martin's [6] yesterday he said the cause of the trouble here was arthritis. Ladies and gentlemen, not even the Southern Pacific Hospital record claimed that. They said "syphilis," they said "degenerative spinal cord disease," but they didn't say that arthritis was the cause of this disability.

Bear in mind that Mr. McQueen didn't have any trouble or difficulty until this accident took place.

At the very least, he had no difficulty for a period of seven years, even though, as I say, in 1950 his admission to the hospital was really for flu. He hadn't been near the hospital in that seven-year period.

Now, you have two doctors who appeared in person here—Dr. Norcross and Dr. VanHorn. There is too much variance between their testimony to be able to fit it together and match it. They are diametrically opposed on so many points. Again, it is a matter for you folks to use your common sense on under the instructions which His Honor gives to you. It is part of your function to size up the witnesses, to find the facts, to find the truth. And with respect to witnesses, we have certain things to consider. Sometimes it is a matter of the witness' demeanor, sometimes it is a matter of whether a man contradicted himself or not, sometimes it is a question of, are his statements reasonable or unreasonable in the light of the other evidence in the case. And sometimes we find a situation where Dr. VanHorn kept talking about other people [7] who were hysterical and had such and such results. Well, was Mr. McQueen in that category? Oh, no, no. But then he talked about other people who were functional, sometimes with insurance something happens. But there was never anything to put Mr. McQueen in that category either.

And then on simple questions we found answers that—well, by way of illustration, if you ask a man if he robbed a bank and he is innocent, he will say, "Why, no." But if you ask another man and he

goes into a long, involved alibi with contradictions in it, then you think, well, you had better check up on that.

So altogether, it is a matter of sizing up the testimony of the witness with all the evidence in the case.

Now, a further point. The violence of this accident is again undisputed and undenied. There was a suggestion both by counsel in his opening statement and by Dr. VanHorn as though there were a pre-existing condition here, but have in mind Mr. McQueen was not disabled for at least this period of seven years before this accident.

And we have this principle, that the existence of a pre-existing physical condition which may have made a person more susceptible to the type of injury which resulted from the negligence, or which aggravated it, does not stand in the way of a full recovery against the defendant. So that even if the pre-existing physical condition of Mr. McQueen's spine [8] may have made him more susceptible to injury, and the accident he suffered might not have injured the spine of a normal man, well, then his pre-existing physical condition aggravated the result of the accident, but the Southern Pacific Company is nevertheless liable for the full amount of the damages sustained by Mr. McQueen.

In other words, it is a matter of the accident causing the disability, the pain, the distress.

This is Mr. McQueen's only day in court. Your verdict is going to be it. There is no other award or compensation for him, there is no tomorrow,

next week or next year. The law intends that your verdict here be full and final redress.

We think that in this two-year period the Southern Pacific Company should have taken care of this man long ago. But it is a situation that is going to be left for you to decide.

I want to emphasize that we make no appeal to prejudice here. We do not ask for a verdict based on sympathy or for anything improper. We do ask that you award Mr. McQueen all that he is entitled to under the law, and we do not hesitate to ask you for your humane, common-sense evaluation of this case.

Now, your verdict must compensate Mr. McQueen for the past, present and future. As I say, there is nothing for him beyond your award and your verdict in this case. [9]

Now, on the subject of damages we have certain elements. I have listed them on the blackboard here ahead of time so as to save courtroom time. But before we get to the elements, we have first the matter to consider of life expectancy. As you can see, at age 63 he had a life expectancy of 15.62 years, which would take him to 78-plus years. At age 65 he had a life expectancy of 14.40 years, which would take him to age 79. It is odd that at age 65 he had a life expectancy which would carry him a year longer than he had at age 63, but that is from the table, a conservative table from the year 1937.

Now, on the matter of damages we have, first, the element of wages lost to the present time, and I

have filled that figure in there, "$15,399." Then on this matter of future loss of earning power, it is sometimes said, "Well, a man doesn't work until the last day of his life." And to be very conservative about it, take it to age 70, a period of five years. That amounts to something over $38,000.

We then have the matter of pain and distress, and that is of two types: physical and mental. And that is both for the past and for the future for each of the items of physical pain and discomfort and mental pain and discomfort.

Then we have the further item of medical expense. We have the bills in evidence here and they add up to $2,872.79.

Now, pain and distress is something that we can't weigh like sugar or flour, we can't measure like a suit of clothes. [10] It is a matter for you to evaluate in your own sound discretion. It is a proper element of damages, and it is your duty, under His Honor's instructions, to make an award for those items. It is difficult to translate pain and distress into any fixed sum. No witness can come in and give you an evaluation on it or an opinion. We have a situation where Mr. McQueen has been through an awful lot to the present time. Is $10.00 a day too much for the physical pain he has been through up to the present time? That comes out to $3,600 a year.

Is the same too much for the matter of mental pain up to the present time, or mental distress? Again it is the same rate.

For the future, taking into account that he is

improved but still disabled, still under the pain medicine, is $3.00 a day too much for that. That adds up to $1,000 a year.

So that when you take all these items into consideration, we reach some very substantial figures.

Now, on this matter of mental pain, that is something, a mental something, which has various forms and phases, depending upon the individual's temperament, the kind of injury he sustained, whether it is permanent or temporary; and mental worry, distress, mortification, are proper component elements of damage.

Now, I told you in our opening statement that we had prayed in the complaint for damages in the sum of $200,000. I [11] am sure His Honor will instruct you that the prayer in the complaint is only an allegation. It is not evidence, but is part of the papers that were filed. But your award should be based upon the evidence and the facts as you find them and as you apply His Honor's instructions to them.

When this man first came to our office, you will recall that up until the operation he was in this situation where he walked with this wide-based gait; and where in the hospital records they referred to him as a manikin, I referred to him as a zombie. He had the terrible sense of pressure in the back of his head and neck. I thought he had a severe brain injury at the time. Now that we have got the full picture so that we know exactly what it is, this injury to his spinal cord is almost as bad.

So it is up to you, you 12 people from different walks of life, using your unbiased, composite judgment here, to reach a verdict. All we want you to do is consider the evidence here, consider this case on the facts, each one of you taking his or her part in the deliberations, each one of you being represented in this verdict—a verdict that will pay this man only his actual monetary, dollars-and-cents loss for each element of damage under His Honor's instructions.

Now, I say to you sincerely that I personally think that we should have a verdict in this case of not less than $50,000. So often we hear that jurors have wondered at the [12] failure of the attorney to explain his views as to how much should be awarded, and they say, "He talks about everything else," and in this case that is the only issue for you to decide. So, as I say, I sincerely feel that your verdict should not be less than $50,000. You can see that with just his wage loss and medical expense to date, and five years' more earnings, that even that sum is exceeded. So in addition, he is entitled to compensation for his past, present and future pain and suffering and, in my opinion, those items in addition—for those items in addition, another $50,000 could be awarded.

But, once again, I am expressing my views so that you may hear what I have to say, so that counsel may have a chance to reply. In the final analysis it is not what I say or counsel says or anybody else says; it is up to you, under His Honor's instructions, to exercise your collective judgment here to see that this man is fully compensated.

I will close now. I will have an opportunity to speak briefly when Mr. Martin is through.

Mr. Martin: Your Honor please, it is close to recess time. I think it might expedite matters if I were to go through my notes.

The Court: Well, I want to instruct the jury this morning. All right, we will take a brief recess.

(Short recess.) [13]

Closing Argument For Defendant

Mr. Martin: Your Honor, counsel and members of the jury: It is now my opportunity to discuss with you briefly the evidence in this case and the facts as I view them from the other side of the counsel table and on behalf of my client, Southern Pacific Company.

First I wish to thank you for the attention you have paid to this case. The testimony has been brief and I don't think I have to dwell on it at any great length because you are just as intelligent as I am and you heard it just as I did. It hasn't taken long and there is no use rehashing it at length.

I want to, first of all, sort of apologize to you and His Honor and counsel in that I may have had difficulty making myself understood, because I have a head cold which it is rather hard to negotiate under, but I will do the best I can.

This is my only chance to talk to you because the way these cases work is that plaintiff makes the opening argument, which you just heard, and then the defendant is given a chance to discuss the case with you, and then, finally, Mr. Hepperle will close

in his reply argument, which is designed to be directed to any new material which I have brought up in my argument.

As you know from what has gone before, we are dealing here with a law known as the Federal Employers' Liability Act, [14] which relates to the rights of employees of common carriers by rail, or railroads, to bring suit and recover damages against their employers for injuries connected with their employment. This may seem to some of you who are familiar with the California system to be a rather, let us say, formal way or archaic way of settling things, rather than by the commission system and the compensation law that we have in the state and many other states.

However, this law has been on the books for a long time, since 1908, and whether we like it or not, it is the law, and we will have to take our instructions as to the law from His Honor and I am sure he will instruct you fully in all the provisions of this law which have application here.

Now, I know as I stand here that my part in this case and the client whom I represent is not the most sympathetic part of these cases. I represent a railroad and I represent a corporation, and this is a suit by an employee for injuries sustained on the job against my client. Now, it may be that during the course of this trial I may have said something or done something that may have offended you. I assure you, if I have, it was inadvertent, it wasn't intended to do that. But if by any chance it has,

I sincerely hope you will take it out on me and not on my client.

We are here, I am sure His Honor will tell you, to dispense justice under the law and any feeling you may have [15] against or on behalf of one of the parties shouldn't influence your judgment. We are here to view this case dispassionately and decide it under the evidence and under the law and nothing else.

I am sure you are all aware of the fact that unless every person in a courtroom is given the same consideration, our system of justice is meaningless, regardless of whom that person may be, and on my behalf and for my client I am asking you not to give us any more than we are entitled to, but, on the other hand, don't give us any less. In other words, what we want here and what we are entitled to is an even break, and to have this case decided on the evidence and on the law. I don't know whether any of you have had experience with them before or not—usually there is a dispute in these cases as to who is at fault, because this federal act takes that into consideration just as responsibility is involved in the law, but it is not here in this case. In this particular case, as has been indicated to you by the Court, by counsel and at the beginning of this case we have admitted that this student tower man on the signal mistakenly threw a switch which caused a signal light to go red in the face of an engineer in the yard. This light the engineer was bound to obey by stopping that train as fast as he could, and his testimony is that he made an emer-

gency application of the brakes, as he was required to do, on a train traveling at 6 to 8 miles per hour, which [16] brought it to a sudden stop.

Now, under the way this case has developed and under the law, as His Honor, Judge Goodman, will tell you, the only issue for you to decide in this case is the reasonable compensation to which Mr. McQueen is entitled under the law. I want to make that point clear from the beginning. It has been the position of the defendant here that we are at fault, no question about that.

Now, what happened here, and to follow this matter through, is that Mr. McQueen was seated at a desk which the pictures here of the caboose will show. When this stop occurred, he was thrown against a partition and the picture there will show you what it was. He, as I remember the testimony, hurt his right arm, hit the right side of his head and broke his false teeth in the occurrence. Then they went down to the yard where reports were made out by the conductor and finally Mr. McQueen was taken to the General Hospital in San Francisco. There he was looked at and an X-ray taken, and he was sent back—he remained in San Francisco and went home the next day and reported back to the hospital a day or two later.

The records will show that he was treated as an out-patient at the General Hospital for several months; that is to say, not a bed patient, but he would go to the hospital, be examined and checked upon and return home, not remaining [17] as a bed patient in the hospital.

Finally, toward the end of 1957, I believe it was in October, from October through about April, I believe, of 1958, he was admitted to the hospital on various occasions where he would remain for a week or two at a time, given various tests, etc., and finally, after having been examined by a host of consultants, was discharged from the hospital with a diagnosis of posterior cord disease of unknown etiology, which has been explained to you as meaning "causation unknown," and also an indication in the record of suspicion of lues or spyhilis.

I have made no point of that in this trial and I make no point of it now. That syphilis statement on the record, as far as I am concerned, has no bearing on the case and wasn't brought up by me, and I had no intention of bringing it up. It has been brought up by Mr. Hepperle, for what reason I don't know. None of the doctors here have testified that that had anything to do with it, and certainly I would be the last one to make any such statement here.

The thing I want to get over to you is, as far as the initial aspects of this case were concerned, is to bear in mind that this was not a case of a man having a definite, frank compression of the spinal cord. The hospital doctors, and there were many of them, as can be observed from these records, did not make such diagnosis. And the next doctor outside of the hospital department doctors to see Mr. McQueen was [18] Dr. Norcross who saw him in December of 1957, some seven or eight months after the accident.

Dr. Norcross—and you will recall the testimony—his diagnosis at the time he first saw him was of a neck whiplash or strain, and his other diagnosis was a degenerative disorder of the nervous system. Those were his diagnoses when he first saw Mr. McQueen.

Then later on we had Mr. McQueen examined by Dr. VanHorn, as we are entitled to do, and Dr. VanHorn made substantially the same diagnosis—degenerative disorder of the nervous system—and he gave his reasons why he arrived at that diagnosis, and he told you on cross-examination by Mr. Hepperle that where you have a severe compression of the spinal cord there are findings which you have which are objective findings. That is, there is no question about them; they are there. You have muscle atrophy or wasting away of muscle. You have a loss of muscle power. You have a disturbance of sensation. Those types of things which are quite commonly associated with the compression of the cord.

This Mr. McQueen did not have. Nor did Dr. Norcross believe he had at the time he first saw him. It wasn't until over a year later, in fact a year and three months later, that Dr. Norcross had Mr. McQueen entered at the Peralta Hospital in Oakland where they did a myelogram and found these indentations. [19]

Dr. Van Horn explained to you what that thing is. They have this fluid which is lying in a sort of a tunnel; you are looking down on top of it, and these ridges that appear on the bony part of the

canal of the spine show up as indentations in this puddle of material which can be looked at through X-rays.

This condition was observed on the myelogram and Dr. Norcross then performed an operation at the largest of these ridges, which is between two vertebrae and the neck, and did not remove the ridge which he found there, but simply freed the cord by cutting a couple of ligaments which permitted it to ride freely over that ridge.

So I think that anyone who is casting aspersions at the diagnosis of Dr. Van Horn and the Hospital Department at the beginning of this case, considering Dr. Norcross' own diagnosis, is hardly in a good position to question those early diagnoses.

Now, the things that impressed me—one of the things that was said by Mr. Hepperle in his argument I thought, let's say, was not fair. He stated, in effect, that Dr. VanHorn called Mr. McQueen a fake. Well, now, I heard the testimony and I thought you did, too, and I thought that Dr. Van Horn was quite clear in saying that he did not believe that Mr. McQueen was malingering or was a faker. Dr. Van Horn merely said that with Mr. McQueen's absence of these objective findings that he mentioned to you and with his pronounced symptoms in the absence of the findings, he thought there was what is [20] known as a functional overlay on the case; that is to say, the man is unconsciously exaggerating his condition, due to nervousness, tension and that type of thing. Now, that is a long way from saying a man is a faker.

I want you to bear that in mind because in lots of these cases the appeal to you is not to decide them emotionally, but items are injected into argument which subtly have that effect. I want you to be careful, in deciding this case, to make sure that no emotional appeal, either obvious or subtle, influences your judgment in this case.

Now, the record will show—and both Dr. Norcross and Dr. Van Horn have testified—that Mr. McQueen, pre-existing this accident, and a long time pre-existing this accident, had arthritis in his spine—in his neck. Dr. Norcross admitted that it was severe, and Dr. Van Horn told you that the X-rays shown at the Peralta Hospital showed that it was so far advanced, in fact, that some of the vertebrae in his neck have actually grown together causing these bony spurs to project out.

And Dr. Norcross told you—he didn't tell you this accident caused the condition in this man's neck for which he operated. The most that Dr. Norcross said was that the accident aggravated that condition which had been there for a long time. And Dr. Norcross went even further. Dr. Norcross said that this condition which he found, this ridge along the [21] back of the spinal canal, the front of it—this ridge is something that is caused by arthritis and, as a matter of fact, can cause symptoms without injury at all—which I think is quite significant in this case.

We do know that Mr. McQueen had had neck symptoms and headache associated with it prior to this time. In 1950, the record will show, he had

those symptoms and that he was given traction for it. That is, they stretched his neck for it. Now, I don't think that is related to influenza. That is in the record, and Dr. Van Horn told you what that record showed.

Now, I think another thing of some significance was that when Mr. Hepperle was cross-examining Dr. Van Horn, he said, "Well, isn't it a matter of fact that the Peralta Hospital records say that this was a ruptured intervertebral disk"? And Dr. Van Horn said, "Well, that's only an interpretation made by a radiologist who is not an expert in this field. And furthermore, doesn't the entry in that record have a question mark after that statement?" And Mr. Hepperle looked at the record and was forced to confess that there was a question mark there.

So this picture is not the black and white picture that Mr. Hepperle has pointed to. What we have here, and I think it is amply demonstrated, is that following this accident Mr. McQueen had apparently struck his right arm and he had [22] some symptoms in his right arm. He had a strain of his neck from which he had headaches, as he has testified. He had some symptoms in his spine which apparently were of a mild compression of the cord, but of a mild nature or, otherwise, they would have produced the full-blown symptoms, which they didn't, full-blown findings.

These symptoms, as far as the loss of balance was concerned, were related to the cord and they were the type of thing which occur with people with this

developing arthritis in the neck and occurs with advancing age.

Now, this operation which was done by Dr. Norcross—and you heard the testimony—has produced striking subjective relief. That is to say, Mr. McQueen feels an awful lot better following this operation. He has testified his headaches have gone, his balance is okay; he has some neck pain and he has difficulty raising his head high. But bear in mind, and I think it's a matter of common sense, and I don't think any doctor has to tell you this,—bear in mind that we are looking at this case 60 days after an operation on the neck. And certainly Mr. McQueen is entitled to some complaints in his neck 60 days after an operation, and a little over a month since he left the hospital.

Mr. McQueen has told us that he tires. He has a feeling of fatigue. Dr. Norcross told us that he is suffering from a mild anemia and that this anemia is under control and, as [23] far as the testimony went, this anemia will be taken care of and that accounts for the tiredness which he feels.

The operation report failed to show any evidence of any damage to the cord itself. So we have Mr. McQueen at the present time with some neck pain, which I say is to be expected; with some limitation of motion in the neck, and certainly in a convalescent stage following a neck operation he is entitled to some over and beyond the limitation in the neck which he would have normally because of the advanced arthritis he has in his neck.

Now, substantially, that is the present picture.

I think it is a little unfortunate that you people are having to decide this case so soon after the surgery. I think it would have been much better to have had the trial six months after surgery, but I think the evidence is clear from all, including Dr. Norcross, that Mr. McQueen is improving, has improved, and will continue to improve.

Now I am going to proceed quite quickly because I am taking up too much time, I know, and his Honor wants to instruct.

With reference to the claim of damage here, it is true that there is no restriction on the part of the railroad to the age at which men work, brakemen and conductors. But I don't think it follows from that that everyone works until age 70. And I think it also follows that the life expectancy [24] tables are no criterion as to how long a man will work, because it is common knowledge that people don't work until they drop dead.

Now, we are not dealing with a statistic, a life expectancy table, something out of the air. We are dealing with a specific individual, Mr. McQueen. What do we know about Mr. McQueen as far as his work expectancy is concerned? We know that Mr. McQueen has advancing arthritis in his neck, and has had it for a long time and it is most severe right now. We know that Mr. McQueen has marked arteriosclerosis as is developed by his chest X-rays. That is hardening of the arteries. We know that Mr. McQueen has had difficulty with his neck before this.

Now the question is, we award him the damages

asked here to date, which are $15,000 and something, for wages lost to date. We do that upon the assumption that Mr. McQueen would have worked steadily for two years, to the present time, without showing any of this condition which he has had and has long had, without any of that affecting him in any way. Now, I think that is giving Mr. McQueen not the worst of it by a darned sight.

Then we are asked to blithely assume that he will work five years more, until age 70. I say in the face of the facts in this case and what we know about Mr. McQueen, the specific person we are dealing with here, that is asking you [25] as jurors to assume a good deal in Mr. McQueen's favor, and I don't think it's the fact.

Now, as far as the operation is concerned, this condition, this ridge which he had, was not put there by this accident. It was a pre-existing condition and everybody has said so. The operation has relieved that condition. It no longer is a source of difficulty. How much the actual accident mixed that up is a matter of conjecture, but it was there a long time before the accident. The operation cleared a condition, or the operation corrected a condition which long pre-existed the happening of this accident.

Now, by giving Mr. McQueen the total cost of that operation, we are not giving him any of the worst of it, I submit, under the evidence.

Then we have one other matter, and that is, the testimony of Mr. McQueen in this case is that he intended to continue working. Well, at that time he

was age 63 and I suppose when he did think about it that would be the normal assumption. People, unless they are forced to retire at a given age, don't ordinarily make specific plans to retire at a specific time. But I think under the circumstances of this case, as he approached 65, when he would be entitled to his maximum pension, Mr. McQueen would have given considerable thought, in view of his physical condition, about retirement at age 65.

Now, there is one further thing and that is this: For [26] you to consider in connection with how long Mr. McQueen would have worked. He is entitled to the maximum pension right now and has been since he reached age 65 in May.

Mr. Hepperle: I think that is improper, your Honor.

Mr. Martin: Now, your Honor, I am not speaking of the question of mitigation of damages at all. I am going into the motivation for Mr. McQueen retiring.

The Court: Proceed.

Mr. Martin: Mr. McQueen is entitled to his maximum pension at the present time and he has not applied for it. Now, we know that Mr. McQueen is getting better. We know he is not out of the convalescent stage of his operation. We know that as a conductor most of his work is riding in the caboose and doing paper work and supervising other employees.

Now, if Mr. McQueen feels that he wants to go back to work as a conductor in the future, I think

that is a decision for him to make. And I think that that decision, based upon his actions in the past, is probably going to be that he wants to go back to work as a conductor. And I think under the evidence in this case that the chances that he will go back to work as a conductor, for which he is qualified to work by his seniority, are quite excellent. But that is his decision. Whether he would have made that decision at age 65 to retire or not we don't know, except that we know he had the physical findings which would cause a man to give a lot of thought to [27] working beyond the age at which he could retire.

Now, under all the evidence in this case, having heard it all, considering the operation which cured a condition which we did not create, giving him the benefit of two years' work to age 65, I think a verdict in the neighborhood—and I am not trying to pinpoint it or tell you what to do because, of course, you are the people who decide these cases—but a verdict in the neighborhood of $20,000 would be a reasonable verdict in a case of this kind.

Now, there are a lot of things here that I haven't discussed, that I have omitted, that I have probably forgotten to do, and Mr. Hepperle will get up and probably mention a lot of things that I could dwell upon, were I to talk to you again, but we are all human and I forget to touch on things that you might consider important. But I have done the best I can. Bear in mind that when I sit down at this counsel table to hear Mr. Hepperle's closing argument, there is nothing I can say, and it is quite a

difficult job to sit there and hear someone say something you could respond to.

I want to thank you again. I want to ask you to listen carefully to the instructions and decide this case without passion or prejudice, and to balance the scales evenly and give both sides the same break that you would like to have.

Final Argument For the Plaintiff

Mr. Hepperle: May it please the Court and ladies [28] and gentlemen of the jury: I am going to try to be brief myself. I say to you, first, if this were only a $20,000 case, we wouldn't be here. If it were, the Southern Pacific Company would have some real evidence to present to you instead of a mere argument.

I say to you this defendant knows what this case is worth. They have a right to argue to the end. On the merits I think it is perfectly obvious they should have taken care of this man long ago.

Now, we had some summary of testimony. Fortunately, I have an official transcript prepared by our official court reporters. A few points first in relation to Dr. Norcross.

As to the myelogram, the reason for it, he said, "I felt we could not make a definite diagnosis in this particular individual, and I further felt that further diagnostic studies were called for. I was not happy with the information we had. I thought we should acquire more information in other ways. In other words, that was the reason for the myelogram, and when the myelogram was performed,

that, again, was the reason for the surgery and the surgery demonstrated the exact condition here."

And then counsel tells you in his argument, ladies and gentlemen, that there was no compression of the cord here. Dr. Norcross' testimony is that, "We entered the spinal canal. We opened the dura. This is a tough membrane that surrounds [29] the spinal cord. And then by tilting the cord slightly to one side, we were able to show a very decided mass that was coming backward against the cord from the area of the vertebral body in front. It was compressing the roots slightly and the cord even more so."

Counsel also tells you that there is no basis for the matter of the herniation of the disk. Peralta Hospital record:

"Final diagnosis: Herniation I.V.," for intervertebral disk. "Wound infected. Operation: laminectomy."

And when the operation had fully exposed all the structure so that Dr. Norcross could see it, we had this testimony:

"Following the operation, Doctor, were you able to make a definite diagnosis as to the cause of Mr. McQueen's difficulty?

"A. Yes. Mr. McQueen had suffered a compressive disorder of the spinal cord."

And then as to the cause of the disability:

"I believe his disability was brought about by the accident of May 29, 1957, which by trauma to his neck and shoulders brought about an aggravation of

a condition that we are quite sure had been present before, but which had been symptomless and which was giving him no difficulty. This injury, then, aggravated, upset and disturbed the state of affairs until it brought about the disability and changes that we found which [30] were in part, at least, helped considerably by the surgical procedure that in part corrected the state of affairs that was found within his spinal canal."

Again, "State whether or not, Doctor, the improvement noted by the patient substantiated your diagnosis of herniated intervertebral disc?

"A. It substantiated my diagnosis of compression of the spinal cord and disordered function of the spinal cord due to herniated intervertebral disc."

And as to return to duty:

"Q. Now, Doctor, do you have an opinion as to whether Mr. McQueen is disabled for his job as a railroad man?

"A. Yes, I think he is disabled for his job as a railroad man. At the present time his greatest disability is pain and discomfort in his neck. The neck can be extremely painful and disabling. The condition of his lower extremities is improved to the point where I think he can walk around ordinarily without much difficulty.

"He finds, though, and this is consistent with our findings and his course, that if he tried to start jumping around or hopping or had to do anything that he might have to do in an active life on the

railroad, he would have difficulty with his leg still. I would question that at his age this is probably ever going to improve to the point where he will be able to get on and [31] off trains and do the things that he would have to do as a conductor on the railroad."

And again Dr. Norcross states at page 82:

"I think his disability resulted from that accident, that is, the one of May 29, 1957."

And then as to the spinal cord itself, he says:

"I think without any question some of the fibers have been killed. Fibers within the brain or within the spinal cord never grow out again because they are dead, and we are left here with a definite deficiency in certain types of fibers in his spinal cord, I think probably those having to do with the agile use of his legs. It is a matter of rapidity or difficult use, and I feel he is going to continue to improve even from what he is now, but some of these fibers have been killed and will not regenerate. They cannot. And I question very much if he will ever be able to be as agile on his legs as he was, or, indeed, to be sufficiently so to carry out his occupation."

And then you will recall the matter of this infection that set in afterwards, and the doctor said,

"Following surgery he developed a superficial infection of his wound. It did not go in deeply, but it was rather resistant to treatment and healed slowly. We had to open it once and then reclose it. This created [32] a lot of scarring in the tissue underneath the skin on the back of the neck, and scarring on the back of the neck is likely to bring about a

rather miserable, long-lasting, chronic, painful neck that is not pleasant at all."

Now, it is true that when Dr. Van Horn was pressed on cross examination he finally said, "Well, I wouldn't say that Mr. McQueen was consciously or deliberately faking," but up to that time, at three different points, he had mentioned this point about exaggeration.

Now, we asked him about the diagram on the board from the book by Dr. Sterling about the cervical intervertebral disc, and he tried to dodge that. He was saying there was exaggeration because he didn't find certain objective findings that would have been caused if there had been cord compression. But then when we follow it further, the description of the diagram itself, the whole purpose for the diagram, "The greatest strain is anterior on track in which disturbance would not be demonstrable by clinical tests."

Regardless of whether he says it is conscious or unconscious, the point is there was this compression, there was this ruptured disc, there was this difficulty about it, and this man is through as a railroad man.

Now, there were so many contradictions in Dr. Van Horn's testimony that it would take a long time if I were to pick them all out of the transcript. You heard his testimony [33] yesterday afternoon. Unfortunately, at times when he was making such long answers it was difficult for you to hear. Even our fine court reporter was unable to catch some of it. However, among other things, Dr. Van Horn

never did notice the fasciculations or twitchings either in the muscles, at the base of the thumb in the hand or in the legs, either on his first examination nor on his second examination. In that connection we find that——

The Court: Mr. Hepperle, I think you should limit yourself. You have already spoken 40 minutes and your opponent spoke only 25 minutes. I see from the type of your remarks that you could go on quite a long time. I don't think that is fair.

Mr. Hepperle: I will close very quickly, your Honor.

The Court: I think you should limit your remarks.

Mr. Hepperle: Thank you, your Honor.

I will close, ladies and gentlemen. I repeat, there are many, many contradictions in Dr. Van Horn's testimony. When you compare it to the facts in the case, to the testimony of Dr. Norcross and the findings, it doesn't stand up.

So I say, "Look at the whole picture here." Dr. Norcross did his best for this man. He saved his life. He saved him from further compression which might have led to paralysis. But this man is through. He is not a statistic; he is a [34] human being. He had the right to live out his life without this injury. We ask that you award him fair and proper damages here. His whole future is in your hands. He will live the rest of his life with your verdict. Thank you.

Instructions of the Court

The Court: Members of the jury, inasmuch as some of you have had no prior experience as jurors, I just will give you brief bits of advice about your part in this case.

You are the sole judges of the facts in a case of this kind and no one else has a right to interfere with your province of deciding the facts. In this case the facts which you will decide will be somewhat limited because they will be limited to the question of the amount of damages. The Judge will give you some advice as to the law and you will have to accept his statement as to the law. You have to assume, rightly or wrongly, that the Judge knows what he is talking about when he tells you what the law is and be guided accordingly.

I say that to you because it does sometimes happen that a person comes into the jury box with some preconceived notions about political or economic or legal theories, and they will proceed to say what they think the law should be and then decide the case that way. Well, that is wrong. We don't permit it because, if that were the case, no man's life or [35] liberty or property would be safe. Hence, we require the jurors to make their decision within the limitations which the law prescribes, as the judge explains to them what the law is.

So while we have somewhat different functions to perform, you decide the questions of fact and I tell you what the law is, we are, nevertheless, in a sense a sort of a team because we both have the same

objective and that is to try to do justice between the parties before the Court as best we can.

Now, you shouldn't let your decision in this case in any way be influenced by any sympathy or prejudice. It is a cold-blooded proposition, as it were. You decide the case on the basis of the evidence that you have and no other considerations should enter into your decision.

This is a civil case, and in a civil case the plaintiff has the burden of proving his claim by a preponderance of the evidence. That means that the evidence produced on his behalf has more convincing weight—if the evidence produced on his behalf has more convincing weight and effect than the evidence against it, then he has sustained the burden of proof. We are not particularly concerned with this doctrine in this case because the evidence has been very limited and, in fact, aside from the medical phases of it, is not very much in dispute. Of course as to the medical phases of it, there is some dispute and you have to apply the doctrine of the preponderance of [36] evidence and decide whether or not the evidence produced on behalf of the plaintiff has more convincing weight, in effect, than the evidence produced the other way.

In deciding that, you have to weigh the testimony of the witnesses who have testified here, and you determine that by considering the manner in which the witnesses testified, the demeanor of the witness, whether he contradicts himself, whether he is contradicted by the testimony of some other witness, what, if any, interest he has in the case, whether for

the plaintiff or for the defendant, and upon the basis of all those factors you determine how much weight to give to the testimony of a particular witness, and it is your exclusive province to determine how much weight you wish to give to the testimony of any witness.

This is a Federal Employers' Liability case, as has been told to you. It is a suit brought under a federal law that allows the employee to bring an action in court to recover damages for any injury that he may have sustained as the result of the negligence of the railroad company. The railroad company, being a corporation, only acts through its employees and representatives, and so the negligence, if any, of an employee acting within the scope of his employment is the negligence of the railroad company.

The employee does not under this law assume any of the risks of employment. He cannot be deprived of a recovery in a [37] case if it appears there has been negligence on the part of the railroad company or its employees by any idea that he has assumed any risks of employment.

In this case the evidence was not disputed and it has not been contended otherwise than that this accident happened because of the negligence of an employee of the railroad company, and, consequently, you may start off in your consideration of this case on the basis that the negligence is not in dispute here, and that the plaintiff came to whatever injury he suffered as the result of the negligence of the railroad company.

That will leave your sole problem in this case the question of determining the amount of damages that the plaintiff suffered as the result of this accident. You should not award any damages to the plaintiff for anything else except for the damages that directly and proximately were caused by the accident that occurred.

You may take into account, in connection with determining the amount of damages, the nature and extent of the injury which was caused to him by the accident, whether it is permanent in character or temporary in its nature.

You may take into account the pain and suffering that he may have suffered, both mental and physical, as the result of the injury and also what is reasonably likely to occur in the future as the result of the accident. [38]

You may take into account the loss of earnings to the present time, and also any loss of earning capacity that he may suffer in the future, depending upon the extent of his disability, the extent of it and the nature of the disability. In considering any loss of future earnings that you may find he may have suffered, depending upon the extent and permanency of the disability which you may find to have been incurred by him, you should not award the total amount of any future earnings that he may have lost, but only the present value of them. There has not been any testimony offered in this case or presented to you with respect to the manner in which you can calculate the present value. I think it would be sufficient for me to say to you, and a fair state-

ment, that not the full amount of the loss of future earnings is recoverable, but only the present value of them; that is, how much, using some reasonable rate of interest at which money can be safely invested, what amount presently invested at a reasonable interest rate would produce that sum of money that has been lost over the period of years that you think may be or that you determine may be the extent of his disability, if you find that he will be disabled for any substantial period in the future.

The lawyers have indicated to you what they consider to be the proper amounts of damages in this case. They have a right to do that. In fact, I would say it is their duty to [39] give you that sort of help in this case. However, you are not bound by the statements of the lawyers either way, by either of them, as to the amount of damages that should be awarded in this case. You form your own judgment on the basis of the evidence that you have before you.

You should not award any damages in this case for any condition of health or illness or disability that the plaintiff may have had at the time of this accident. You cannot award him damages for the condition that has been referred to as arthritis. That is something that he had and that was not caused by this accident. You can, however, consider and take into account in estimating the extent of his injury the extent to which that condition was lighted up or exacerbated, as the doctors say, by the accident that occurred on the day that has been referred to here, and the damages that he is entitled

to are to that extent subject to some limitation, that is, that they must be confined to the injury that was caused by the lighting up of this pre-existing condition that he had.

That does not mean that you are not and should not give consideration to allowing full damages, whatever they may be, for the injury that might have been caused by the lighting up of this previous condition of arthritis which admittedly he had.

Now, the damages such as you award in this case should be reasonable. They should be based upon the evidence. They [40] should not be by way of punishment to the defendant in this case because this is not a case in which damages by way of punishment or penalty are awarded. You are not here to divide the wealth of the world in the form of assessing penalties. Your award should be the full measure of whatever the evidence shows the plaintiff is entitled to receive, no more and no less.

Now, I think, members of the jury, that since your activities will be somewhat confined to the issue of damages, that I have given you about all of the advice that I can which will be helpful to you.

I might say that there is one matter which occurs to me that perhaps I overlooked, and that is whether or not the plaintiff is entitled to receive a pension, or whether he has it or has applied for it, or the amount of it is not a consideration that affects the amount of any award for damages.

You should use your common sense in this case. Consider all of the natural propensities and tendencies of human beings which you know about, which

you have learned about in the course of your lives. That is what we mean when we say "common sense" —"use your common sense."

You shouldn't, in arriving at an award in this case, make use of any element or scheme of chance to decide the amount to be awarded. That is sometimes done. Sometimes the jurors, or each juror, writes down on a piece of paper how much he or she thinks the plaintiff is entitled to, and [41] they add it up and divide by 12. Well, that is a very easy way to come to a decision in the case, but if I may say so, without being offensive to you, it is also a very lazy way of performing the duties of a juror and you should not do that.

I don't mean that you should not freely discuss amounts between yourselves and make adjustments in accordance with the discussions which you have, but you shouldn't use any scheme of chance to arrive at your decision.

Now, when you go out to the jury room to deliberate, you select one of your number as foreman or forelady, as the case may be, and he or she will preside over your deliberations, will sign your verdict for you when you have reached it, and will represent you in the further conduct of the case in this court.

In the federal court your verdict must be unanimous. You cannot reach a verdict unless all of you have agreed to it, so you should not return to the courtroom from the jury room with a verdict unless in the jury room all of you have agreed to the verdict.

We have prepared a form of verdict for you. It reads:

"We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of $....."

Whatever amount you agree to should be inserted in that blank space and the foreman signs the verdict and that is your verdict. [42]

If, after you have retired to deliberate and have organized and have elected a foreman, you wish to see any of the exhibits in the case, you may send word through the officer and we will see that they are sent to you.

Does either side have any suggestions or corrections?

Mr. Hepperle: No, your Honor.

Mr. Martin: I have one matter about which your Honor has already ruled and which I wish to note for the record. I don't know whether it is necessary at this time.

The Court: You wish to note an exception on the failure or refusal to give any instruction on contributory negligence?

Mr. Martin: Yes, that is right, your Honor.

The Court: The record will note your exception.

Mr. Martin: Thank you, your Honor.

The Court: Now, ladies and gentlemen of the jury, it has reached the noon hour and I am going to send you out now with the Bailiff. I don't think you will be able to get too far on empty stomachs so, if you wish, and after you have gotten yourselves

organized and elected a foreman, the Bailiff will take you to lunch, and then after lunch you can commence your deliberations.

I don't mean to say that I am in any way prohibiting you from discussing it at any time after you have gone out to the jury room, but I think it will be better if, after you [43] have organized, you go to lunch with the Bailiff and then resume your deliberations after lunch.

(Thereupon, at the hour of 12:00 o'clock noon, the jury retired to deliberate upon their verdict.)

(At the hour of 2:50 p.m. the jury returned to the courtroom and the following proceedings were had:)

The Court: Has the jury arrived at a verdict in this case? Give the verdict to the Deputy Marshal, please.

The Clerk: Ladies and gentlemen of the jury, hearken unto your verdict as it shall stand recorded:

We, the jury, find in favor of the plaintiff and assess damages against the defendant in the sum of $60,000.

Is that the verdict as rendered? The verdict is unanimous, your Honor.

The Court: Do you wish the jury polled?

Mr. Martin: Please, your Honor.

(Thereupon the jury was polled and each juror answered in the affirmative to the Clerk's question, "Is the verdict as rendered your verdict?")

The Clerk: The jury has been polled, your Honor.

The Court: The 12 jurors having answered in the affirmative that the verdict as rendered is their verdict, the Clerk is directed to record the verdict.

Members of the jury, the Court wishes to thank you for [44] your time and attention that you have given to this case, and you will get some notice later on when you have to come again.

(Thereupon the jury left the courtroom.)

The Court: Do you want a stay?

Mr. Martin: Yes, your Honor, can we have a stay of execution for ten days?

The Court: There is no objection to that?

Mr. Hepperle: No. [45]

[Endorsed]: Filed August 25, 1959.

[Endorsed]: No. 16591. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company a Corporation, Appellant, vs. Harry J. McQueen, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: August 26, 1959.

Docketed: August 27, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 16591

SOUTHERN PACIFIC COMPANY, a corporation, Appellant,

vs.

HARRY J. McQUEEN, Appellee.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD

Agreeably to Rule 17, paragraph 6 of the Rules of the above Court, appellant Southern Pacific Company, a corporation, makes its statement of points on which it intends to rely and its designation of all of the record which is material to the consideration of its appeal as follows:

I.

Statement of Points

The points upon which appellant intends to rely are as follows:

1. The refusal of the Court, duly excepted to, to submit to the jury the issue of the contributory negligence of the plaintiff tendered by defendant's answer and endeavored to be tried and presented by defendant and, in this regard, and more particularly:

(a) Court's admonition to the defendant, in the

course of defendant's opening statement, not to assume that the issues of contributory negligence of the plaintiff could be submitted to the jury (p. 117, 1.7 of the Reporter's Transcript of proceedings of June 2, 1959);

(b) The Court's advice to counsel for the defendant that it saw no basis for instructions on contributory negligence and would not instruct on that subject (p. 2, 1. 11 ff of Reporter's Supplemental Transcript of proceedings of June 2, 1959);

(c) The Court's refusal to give Defense Proposed Instructions 6 through 12 (both inclusive); and

(d) The Court's instructions to the jury in which it refused to instruct on the issue of contributory negligence or to submit that issue to the jury and its instruction: "In this case the facts which you will decide will be somewhat limited because they will be limited to the question of damages." (p. 35, lines 12-14 of Reporter's Transcript of proceedings of June 3, 1959) and its instruction to the jury: "That will leave your sole problem in this case the question of determining the amount of damages that the plaintiff suffered as the result of this accident." (p. 38, lines 12-14 of Reporter's Transcript of proceedings of June 3, 1959.)

2. The evidence was sufficient to sustain a jury finding that the plaintiff was guilty of contributory negligence and was sufficient to submit to the jury whether or not he was so guilty of contributory negligence and that the amount of any award should be

reduced in proportion to such negligence as they found, all agreeably to the provisions of the Federal Employers' Liability Act.

3. The Court erred in not receiving into evidence and as bearing upon the issue of contributory negligence of the plaintiff, Operating Rule No. 2061 of defendant- appellant, offered in evidence by defendant and designated as Defendant's Exhibit C for Identification.

4. That accordingly the verdict is excessive and is without any reduction, or consideration of the matter of reduction, by the jury on account of contributory negligence attributable to the plaintiff.

II.

Designation of Record

Appellant hereby designates as all of the record which is material to the consideration of this appeal, and designates for printing the whole of the certified record on appeal (except as hereinafter specified), including exhibits appropriate for reproduction when required to be printed by the Rules of this Court when designated; and as not appropriate for reproduction by printing and as matter not designated for printing, specifies as follows:

(a) Exhibits; except that there shall be printed Plaintiff's Exhibits 3, 3-A and 5 and Defendant's Exhibit C for Identification;

(b) Plaintiff's proposed instructions;

(c) Defendant's proposed instructions except Defendant's proposed instructions 6 through 12 both inclusive and these shall be printed.

/s/ ARTHUR B. DUNNE,
/s/ JOHN W. MARTIN,
DUNNE, DUNNE & PHELPS,
Attorneys for Appellant Southern Pacific Company.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 28, 1959. Paul P. O'Brien, Clerk.